87-750

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 6, 1987

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QUESTIONS PRESENTED

1. Whether a defendant who is jointly and severally liable for a foreign plaintiff's losses is precluded, as a matter of law, from invoking the discretionary principles of *forum non conveniens* whenever a co-defendant, such as the United States, is unable or unwilling to appear in any foreign court that could serve as the "alternative forum" for trying damages claims.

2. Whether the limitations on liability established by the Warsaw Convention and the Montreal Agreement are extinguished pursuant to the terms of Article 3(2) of the Convention or the Montreal Agreement if the advice of limited liability that is printed on the passenger's ticket appears in 9-point rather than 10-point type.*

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* In addition to the parties listed in the caption, the United States, Luis Alberto Trivelloni-Lorenzi and Susana Electra Trivelloni-Lorenzi were parties to proceedings in the Court of Appeals.

The companies and organizations Pan American World Airways, Inc. ("Pan Am") is required to list in compliance with Rule 28.1 of the Rules of this Court are the following: Aeronautical Radio, Inc., Air Cargo, Inc., Airline Tariff Publishing Company, Escola Americana de Rio de Janeiro, Honolulu Fueling Facilities Corporation, International Aeradio (Caribbean) Ltd., Liberian Development Corporation, Manhattan Air Terminal, Inc., Nigerian Aviation Handling Co., Pan Am Corporation, Promotora de Hoteles de Turismo Medellin, S.A., Radio Aeronautica Paraguaya, S.A., Social Immobiliaria Norteamericana, S.A., Societe de Tourisme et Representation, and Societe International de Telecommunications Aeronautiques.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Pan American World Airways, Inc., respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a) is reported at 821 F.2d 1147 (1987). The opinion of the panel of the court of appeals (App. 81a) is reported at 789 F.2d 1092 (1986). The district court's order granting partial summary judgment for plaintiffs (App. 102a) is not reported. The district court's order deny-

ing Pan Am's motion to dismiss on the grounds of *forum non conveniens* is reflected as a "minute entry" on the court's docket sheet and is not reported.

JURISDICTION

The judgments of the court of appeals upon rehearing *en banc* were entered on July 21, 1987. App. 103a and 105a. On October 12, 1987, Justice White extended the time for filing this petition for a writ of certiorari to and including November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

TREATIES AND AGREEMENTS INVOLVED

The Warsaw Convention,[1] a treaty ratified by the United States, is reproduced in part at App. 107a-110a. The Montreal Agreement,[2] a private agreement signed by various air carriers, is reproduced at App. 111a-114a.

STATEMENT OF THE CASE

1. *Proceedings in the District Court.* On July 9, 1982, Pan American World Airways, Inc. ("Pan Am") Flight 759 crashed at Kenner, Louisiana, killing all 145 people on board. Approximately 56 of the victims were foreign nationals.

Relying on diversity jurisdiction, 28 U.S.C. § 1332, foreign nationals filed approximately 52 actions in various United States District Courts to recover for the

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. app. § 1502; App. 107a. (Hereinafter referred to as the "Warsaw Convention.")

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900 approved by CAB Order E-23680, May 13, 1966, Docket 17235, 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. app. § 1502; App. 111a. (Hereinafter referred to as the "Montreal Agreement.")

deaths of at least 42 of the approximately 56 foreign decedents who were aboard the flight.[3] These initial complaints generally named as defendants Pan Am, the municipal board that operated the airport, and manufacturers of the aircraft.[4]

After the foreign and domestic cases were consolidated for discovery and related pretrial proceedings in the United States District Court for the Eastern District of Louisiana, Pan Am moved to dismiss the suits relating to all foreign decedents on the ground of *forum non conveniens*. In this connection, it proposed that the dismissal of these suits should be conditioned on various undertakings by Pan Am including: (1) Pan Am would forgo contesting its liability for the accident; (2) Pan Am would waive the limits or ceilings placed on damages of air carriers covered by the Warsaw Convention and the Montreal Agreement; (3) Pan Am would submit to the jurisdiction of (and appear in) the courts of each foreign plaintiff's domicile; and (4) Pan Am would fully satisfy any judgment by the foreign court that was rendered against it.[5] App. 5a.

At the time this motion was made, the United States was not a party defendant because the plaintiffs had not yet exhausted the administrative procedures of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-72, 2675; but it

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[3] In addition, approximately 39 suits were filed by American nationals against Pan Am and others in federal courts for the wrongful death of approximately 44 victims who were nationals or residents of the United States.

[4] Among the defendants sued were United States Aviation Underwriters, Inc., the New Orleans Aviation Board, and the manufacturers, including the Boeing Company, United Technologies Corp., and the Pratt-Whitney Aircraft group. Eventually all defendants except Pan Am and the United States were dismissed from the various cases. App. 6a.

[5] Pan Am's insurers guaranteed the payment of any judgment rendered against Pan Am. App. 48a-50a.

was clear that many plaintiffs would sue the United States because of the role that its air traffic controllers had played in the crash. Because the United States cannot appear in foreign courts,[6] the United States' status as a nascent party defendant in the district court posed the issue whether, as a prerequisite to invocation of the doctrine of *forum non conveniens*, all defendants must be amenable to process in the foreign court that is proposed as the alternative forum.

In its motion, Pan Am advised the District Court that the conditions of dismissal that the carrier proposed were calculated to make the United States a superfluous defendant because Pan Am would not contest liability, would waive the various treaty limits on the amount of damages it would pay,[7] and would fully satisfy any judgment by a foreign court. App. 5a & 41a.

The District Court denied Pan Am's motion without comment. Before the motion was filed, however, the trial judge had said that he would deny any forthcoming motion because the United States is a party and the crash occurred in New Orleans. App. 4a-5a. Pan Am attempted to present the *forum non conveniens* issue to the appellate court before trial of any foreign case by moving for interlocutory review pursuant to 28 U.S.C. § 1292(b), which was denied, by petitioning the Court of Appeals for a writ of mandamus, which was denied, and by re-

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[6] In the Federal Tort Claims Act, Congress permitted tort suits against the Government, but in doing so, it gave "exclusive jurisdiction" over such suits to the United States District Courts. 28 U.S.C. § 1346(b).

[7] Unlike the liability of air carriers, the United States' liability is not limited by the Warsaw Convention or the Montreal Agreement. See Part II, *infra*. Thus, Pan Am's proposed waiver of these limits would have expanded its own liability to match, or exceed, the extent of the potential liability of the United States.

questing consideration *en banc*, which was also denied. App. 5a.

As the overall litigation proceeded, various plaintiffs either tried their damages claims or settled those claims.[8] The respondents to the instant petition—Ernesto Pampin Lopez and Luis and Susana Trivelloni-Lorenzi—were the first foreign plaintiffs to try damages claims arising from this crash. In advance of their trials, the district court ruled that Pan Am could not invoke the Warsaw Convention and Montreal Agreement, both of which applied to these passengers, to limit its liability to $75,000 per decedent. This ruling rested on the fact that the tickets issued to the passengers provided notice of the limitation in 9-point type, rather than 10-point type. App. 6a-7a.

When these two cases were tried, commencing on August 27, 1984, Pan Am and the United States limited their defense to cross-examination of plaintiffs and their witnesses. Defendants claimed that they were unable to call witnesses and adduce documentary evidence relating to plaintiffs' damages because of their inability to take discovery in Uruguay, the domicile of plaintiffs and their decedents. At the conclusion of the trial, the jury awarded the Lopez family $516,853.89 and the Trivelloni family, $203,530.00. Pan Am and the United States appealed. App. 7a.

2. *Relevant Rulings of the Panel and the En Banc Court.* On appeal, Pan Am contended, *inter alia*, that the District Court should have granted its motion to dismiss on the ground of *forum non conveniens*, and, alternatively, that the District Court should not have lifted the ceiling on liability if the international cases were to be tried in the United States. A panel of the Fifth Circuit affirmed both rulings of the District Court, and the Fifth

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[8] Pan Am did not contest its liability for the accident in any of the cases and thus all cases arising from this crash to date have been limited to issues of damages.

Circuit *en banc* separately reviewed the *forum non conveniens* ruling.

a. *The Ceiling on Damages in International Carriage.* In deciding whether the usual ceiling on an air carrier's liability for international carriage should apply to the New Orleans disaster, the court looked to the Second Circuit's decision in *In re Air Crash Disaster at Warsaw, Poland,* ("*LOT*") 705 F.2d 85, *cert. denied,* 464 U.S. 845 (1983). App. 7a n.8 & 91a. In *LOT*, the Second Circuit held that an air carrier must issue a passenger ticket that provides adequate notice of the ceiling placed on its liability by the Warsaw Convention and the Montreal Agreement. The court further held that any notice given in type smaller than 10-point type is *per se* inadequate.

In the instant case, the panel "accept[ed] and adopt[ed]" the reasoning of the Second Circuit and ruled that Pan Am could not invoke the limit on liability because the tickets—which were issued by an Argentine airline—provided notice in 9-point type rather than 10-point type. App. 91a. The *en banc* court cited *LOT* and reinstated this portion of the panel's decision. App. 7a n.8 & 46a.

b. *Forum Non Conveniens.* The court of appeals, sitting *en banc*, held that there was no occasion for the district court to weigh the convenience of trying plaintiffs' damage claims in decedents' homeland (Uruguay) or to weigh the public interest factors bearing on the location of such a trial. No balancing of conveniences was permitted, in the court's view, because Pan Am had failed to meet the threshold requirement for invoking the doctrine of *forum non conveniens*: namely, Pan Am failed to demonstrate that Uruguay was an "available and adequate foreign forum" for the trial of the Uruguayan plaintiffs' claims. App. 34a, 42a. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947), and *Piper*

Aircraft Co. v. *Reyno*, 454 U.S. 235, 254 n.22 (1981). In the Court's view, Uruguay failed to qualify as an adequate available forum because one of the defendants, the United States, could not appear in that forum. App. 42a.

The *en banc* court's ruling rests on the proposition that the "alternative forum" requirement, established in *Gilbert and Reyno*, cannot be met unless *all* defendants will appear in the proposed alternative forum. The *en banc* court announced this rule at least five times.[9]

REASONS FOR GRANTING THE WRIT

I. The Court Should Review The Fifth Circuit's Decision Because It Establishes An Important And Inflexible Prerequisite To The Invocation Of The Doctrine Of *Forum Non Conveniens*, It Significantly Reduces The Utility Of That Doctrine In Litigation Arising From Class And Mass Disasters, And It Conflicts With A Decision Of The Sixth Circuit.

The court of appeals has added significantly to the threshold requirements that must be met in order to invoke the doctrine of *forum non conveniens* and correspondingly has reduced the occasions when district courts may exercise their discretion in accordance with the principles of *forum non conveniens*. The threshold requirement, as developed by the court of appeals, prevents invocation of the doctrine of *forum non conveniens* in all cases where the plaintiff names the United States as a

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[9] The *en banc* court said: (1) "[T]he doctrine of *forum non conveniens* presupposes the existence of at least two forums in which *all* defendants are amenable to process." (App. 31a; emphasis added); (2) "the moving defendant must establish that an adequate and available forum exists as to *all* defendants if there are several." (App. 33a; emphasis added); (3) "[a] foreign forum is available when the entire case and *all* parties can come within the jurisdiction of that forum." (App. 34a; emphasis added); (4) this case was properly tried in the United States "because no other forum could entertain the plaintiffs' actions against *all* of the defendants." (App. 40a; emphasis added); and (5) Pan Am's proposed conditions for dismissal "simply fail to make *all* defendants available to plaintiffs in a Uruguayan forum." (App. 42a.)

co-defendant or adds a private co-defendant who cannot or will not appear abroad. The restrictive effects of this ruling, moreover, are likely to be greatest in those types of litigation that heavily burden our courts—mass disaster litigation arising from a single incident such as an air crash, and class disaster litigation arising from various exposures to products or substances that may have harmful effects. This Court should review the decision below in order to determine whether the Fifth Circuit's threshold requirement is an appropriate extension of *Gilbert* and *Reyno* and in order to resolve the conflict that presently exists between the Fifth and the Sixth Circuits.

Neither *Gilbert* nor *Reyno* confronted the problem presented here—whether the doctrine of *forum non conveniens* may be invoked when one of the co-defendants who are jointly and severally liable cannot appear in a foreign forum that is otherwise wholly suitable and convenient for trying the plaintiff's damages claims. In *Reyno*, the Court said the "central focus" of the doctrine of *forum non conveniens* inquiry is "convenience," and the guiding principle of the doctrine is "flexibility." 454 U.S. at 249-50. If the Fifth Circuit had concluded that the doctrine of *forum non conveniens* might be invoked by a private defendant in cases where the United States is also a defendant, a trial court would weigh, *inter alia*, the effect of the absence of one defendant on the issues that might be tried in a foreign forum. The Fifth Circuit, however, believed that the weighing process was foreclosed by statements in *Gilbert* and *Reyno*: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process," *Gilbert*, 330 U.S. at 506-07; and "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Reyno*, 454 U.S. at 254 n.22. Thus, the court below concluded that plaintiffs' homeland

was not an adequate alternative forum solely because the United States was not prepared to appear in the Uruguayan courts.[10]

The *en banc* ruling, we suggest, is not compelled by *Gilbert*, which involved a single defendant, or by *Reyno*, where both defendants agreed to appear in Scotland; and the ruling is not consonant with the usual understanding of adequate forums.[11] But most important, in expanding the scope of the threshold requirements established in *Gilbert*, the Fifth Circuit has correspondingly reduced the occasions when the principles or criteria of *forum non conveniens* may be considered by federal courts.

The Fifth Circuit's ruling will deprive private defendants of the protections of *forum non conveniens* whenever the plaintiff adds the United States as a co-defendant. This is an important limitation because the United States has broad exposure to tort liability—especially in the field of aviation--so long as it is sued in a United States

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[10] In contrast, courts have not treated the amenability of potential third-party defendants to suit abroad as a *per se* or threshold matter, but rather as a circumstance to be weighed in determining the relative conveniences and inconveniences of trial abroad. *Reyno*, 454 U.S. at 259; *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 790-91 (D.C. Cir. 1980); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *De Melo* v. *Lederle Laboratories*, 801 F.2d 1058, 1063 (8th Cir. 1986). One might reasonably conclude that it is no more important for the plaintiff to have all defendants present in a single forum than it is for a defendant to have all third-party defendants present in a single forum.

[11] Federal and state courts routinely adjudicate a plaintiff's claims even though some of the tortfeasors who are jointly and severally liable are not before the court. Ordinarily, since a plaintiff can obtain full relief from either of two tortfeasors, neither one is indispensable to the litigation, and the litigation can proceed against one or more of them. *E.g.*, Restatement (Second) of Torts § 882 at 328 (1977); Fed. R. Civ. P. Rules 19 and 21.

District Court.[12] The federal rules of civil procedure provide for liberal joinder of defendants, including the United States; prevailing tort law generally recognizes that two or more parties may be held responsible for a wrorgful death or personal injury; and the Congress has waived sovereign immunity for tortious conduct by the United States, but that waiver only extends to suits brought in the United States District Courts.[13] See 28 U.S.C. § 1346; the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2674, 2679-80 (general tort liability); and Suits in Admiralty Act, 46 U.S.C. app. §§ 741, 742 (Supp. III 1985) (liability for damages involving vessels and cargo).[14]

Similarly, the Fifth Circuit's ruling will deprive defendants of the protection of *forum non conveniens* when-

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[12] For example, for fiscal years 1981-1985, nearly 1,000 complaints were filed in federal district courts against the United States arising from 179 different aircraft accidents, with claims exceeding $25 billion. In addition, during the same period, 1,690 administrative claims were filed with the Federal Aviation Administration seeking more than $43 billion. In 1985, the United States paid over $33 million to settle pending litigation or to satisfy adverse judgments, and the FAA paid a total of $6,691,000 to settle $105 million in claims. Dilk, *Aviation Tort Litigation Against the United States—Judicial Inroads on the Pilot-in-Command Concept*, 52 J. Air. L. & Com. 797, 862 (1987).

[13] The Fifth Circuit erroneously concluded (App. 42a n.37) that the United States consented to appear abroad in *Friends For All Children* v. *Lockheed Aircraft Corporation*, 717 F.2d 602, 604 (D.C. Cir. 1983). The decision does not support that reading and the record in the case shows that (a) only Lockheed had agreed to appear in foreign courts; (b) plaintiffs had not sued the United States; it was simply a third-party defendant that had been sued by Lockheed; and (c) the United States had already agreed to a formula for indemnifying Lockheed.

[14] For other statutes creating liability for the United States, see Public Vessels Act, 46 U.S.C. app. §§ 781-782 (liability for damage caused by a public vessel); and 42 U.S.C. §§ 2211, 2212 (liability for radiation from nuclear powered vessels and nuclear testing).

ever a plaintiff adds a private defendant who cannot or will not appear abroad. In many cases there may be sound reasons why one or more private defendants cannot or will not appear abroad. For example, an American manufacturing corporation probably will not agree to appear in the courts of Iran to defend a products liability claim arising from an air crash in the Middle East.[15] Likewise, present and past employees of a corporate defendant—*e.g.*, the pilot of an airline, the director of testing for a pharmaceutical company, or an engineer formerly employed by Union Carbide—may ostensibly share joint and several liability with their corporate employer for countless injuries and loss of life, but the individuals may reasonably decline to defend in a foreign court since their resources are so limited that they are effectively judgment proof in any forum.[16]

Restrictions on the invocation of the doctrine of *forum non conveniens* also serve to deprive district courts of an important tool for managing air disaster litigation and other mass and class disasters involving international

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[15] See *In re Air Crash Disaster at Riyadh Airport, Saudi Arabia*, 540 F. Supp. 1141 (D.D.C. 1982). Plaintiffs brought suit in the District of Columbia. They were residents mainly of Iran, Saudi Arabia and Pakistan (*id.* at 1149 n.19), who were flying to Mecca in an airplane that was operated by defendant Saudi Arabian Airlines, maintained by defendant Trans World Airways, and manufactured by defendant Lockheed Aircraft Corporation. The order of dismissal provided that only one of the three defendants would be required to appear in any given foreign forum provided that the single defendant would pay all of plaintiffs' damages awarded by that forum.

[16] Compare *Watson* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985) (suit in Ohio against two individual employees of corporate defendant as well as against corporate defendant); *Moorhead* v. *Mitsubishi Aircraft International, Inc.*, 639 F. Supp. 385 (E.D. Tex. 1986), *aff'd in part, rev'd in part*, 828 F.2d 278 (5th Cir. 1987) (suit against pilot's estate, United States, and Mitsubishi).

commerce. In such cases, the plaintiffs' liability claims generally present common issues of law and fact, but their damages claims generally present highly discrete issues of fact that are specific to each plaintiff. Thus, discovery and trial of liability issues may be done conveniently in a single forum, whereas discovery and trial of damages issues may be done more conveniently in other forums. Relying on the doctrine of *forum non conveniens*, district court judges frequently remit foreign plaintiffs to their homelands or to another forum for trial of their damages claims when the issue of liability has been removed from the litigation by stipulation or by a determination of liability in the district court.[17] In such instances, the doctrine of *forum non conveniens* is the international analogue of 28 U.S.C. § 1407, which permits the

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[17] *Bouvy-Loggers* v. *Pan American World Airways, Inc.*, 15 Av. Cas. (CCH) 17,153, 17,154 (S.D.N.Y. 1978) (dismissal after liability issues stipulated); *Gilchrist* v. *Trans Canada Air Lines*, 27 A.D.2d 524, 275 N.Y.S.2d 394, 395 (1966) (liability would be stipulated if case were sent to Canada; dismissal granted although two defendants would not go); *Chhawchharia* v. *The Boeing Co.*, 657 F. Supp. 1157 (S.D.N.Y. 1987) (liability issues stipulated); *In re Disaster at Riyadh Airport, Saudi Arabia*, 540 F. Supp. 1141, 1147, 1155 (D.D.C. 1982) (same); *Jennings* v. *The Boeing Co.*, 660 F. Supp. 796 (E.D. Pa. 1987), amended June 23, 1987 (order available on WESTLAW and in Avi. Lit. Rep. (Andrews) 7320 (July 13, 1987)) (same); *Myers* v. *The Boeing Co.*, No. 86-2-14507-9 (Wash. Super. Ct. Sept. 10, 1987) (reprinted in Avi. Lit. Rep. (Andrews) 7621 (Sept. 28, 1987)) (initially court retained liability phase, but after liability was stipulated, the court dismissed the damages phase). Occasionally, the federal courts may remit plaintiffs to the courts of another country for the trial of both the liability and damages issues. *E.g.*, *Reyno*, *supra* (dismissal for trial in United Kingdom).

Dismissals may be conditioned on defendants' agreement, *inter alia*, to appear, waive the statute of limitations, and produce witnesses or documents. See the above cases and *Pain* v. *United Technologies Corp.*, 637 F.2d at 795; *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2nd Cir. 1987), *cert. denied*, 108 S. Ct. 199 (1987) (dismissal for trial in India).

federal judiciary to manage complex multi-district litigation within the United States.[18]

Finally, the Fifth Circuit's ruling is flatly inconsistent with the Sixth Circuit's decision in *Watson* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985). In that litigation, the foreign plaintiffs sued the pharmaceutical company, Merrell, for products liability and added two of its employees as defendants—a supervisor of testing and a medical director. When the pharmaceutical company moved to dismiss the foreign plaintiffs' claims, it was not clear that the proposed foreign court would have jurisdiction over the individual defendants, and the individuals had not consented to appear in a foreign court. *Id.* at 356-57. The district court granted the company's motion to dismiss as to all defendants because Merrell was the " 'primary defendant,' " and the plaintiffs would not be deprived " 'of a meaningful opportunity to pursue their claims' " even without the individual defendants appearing abroad. 769 F.2d at 357. The Sixth Circuit affirmed the dismissal of Merrell. Thus, in contrast to the instant decision, the Sixth Circuit holds that the doctrine of *forum non conveniens* may be invoked even if some of the defendants are not amenable to the jurisdiction of the foreign court.

The Sixth Circuit's decision, however, has its own problem. The court of appeals determined that the claims against the individuals should not be dismissed. Instead,

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[18] See *In re Air Crash Disaster at Tenerife, Canary Islands on March 27, 1977*, 461 F. Supp. 671 (J.P.M.L. 1978) (remanding cases to transferee courts after defendants stipulated liability); *In re Air Crash Disaster at Pago Pago, American Samoa, on Jan. 30, 1974*, 394 F. Supp. 799, 800 (J.P.M.L. 1975) (denying transfer with respect to an action in which the defendant airline stipulated to liability); *In re Richardson-Merrell, Inc.*, 606 F. Supp. 715 (J.P.M.L. 1985) (remanding plaintiffs not participating in consolidated liability trial to their courts of origin after verdict for defendant in the consolidated trial).

the court remanded the actions against the individual defendants to the district court for trial. The Sixth Circuit also criticized the district court for considering whether the individuals were "primary" defendants and whether plaintiffs would be deprived of a meaningful opportunity to pursue their claims if the individuals did not appear abroad. Thus, the court of appeals said that the district court had engaged in "impermissible intermingling of the threshold criteria with the subsequent balancing test." [19]

In sum, review by this Court is warranted. The Fifth Circuit's decision conflicts with the Sixth Circuit's ruling in *Merrell*, and establishes an inflexible prerequisite that curtails the power of district courts to remit parties to the most convenient forum when, for example, the plaintiffs name the United States or an impecunious individual as a co-defendant. The lower court's ruling, moreover, will have its greatest and most unfortunate effects in class and mass disaster litigation where district courts need broad and flexible authority to manage the cases before them.

II. The Court Should Review The Fifth Circuit's Decision Because It Adopts A Construction Of The Warsaw Convention That Has Been Rejected By The District Of Columbia Circuit And The Supreme Court Of Canada.

The decision below also should be reviewed in order to place a uniform reading on Article 3(2) of the Warsaw Convention and related provisions of the Montreal Agree-

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[19] There is no reported decision as to the steps taken on remand. It was open to the individual defendants to agree to appear and defend in Scotland, to submit to trial in the district court, or to move for a stay of their trials pending disposition of the more convenient trial in the United Kingdom. See, *e.g.*, Restatement (Second) of Conflict of Laws § 86 comment b at 259 (1969) (where an action is pending in a foreign jurisdiction and it is clear that plaintiff can secure all the relief he is entitled to there, a United States court can grant a stay of the second action pending the outcome of the action abroad).

ment.[20] Under Article 3, the air carrier must deliver to the passenger a ticket advising the passenger of the limitation. App. 108a. Pursuant to the Montreal Agreement, a private agreement reached among air carriers in 1966, the advice on the ticket is to be printed in 10-point type. App. 112a.

Foreign carriers regularly issue tickets containing the requisite advice about the limit on liability, but those tickets often fail to provide such advice in 10-point type.[21] United States as well as foreign courts are thus repeatedly confronted with the question whether the limitation on a carrier's liability is extinguished because the message on the passenger's ticket is printed in less than 10-point type.

In resolving this question, the courts of appeals have reached conflicting results based on conflicting constructions of Article 3(2) of the Warsaw Convention:

> "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not

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[20] The Warsaw Convention limits a carrier's liability for death or injury of a passenger to $8,300. The Montreal Agreement raises the limit to $75,000.

[21] See *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (*LOT*); *In re: Korean Air Lines Disaster of September 1, 1983*, No. 85-5982, Slip op. at 11 (D.C. Cir. Sept. 25, 1987) (*"KAL"*); *In re Air Crash Disaster Near New Orleans*, App. 91a and 102a (tickets issued by Aerolineas Argentinas); *Ludecke* v. *Canadian Pacific Airlines Ltd.*, 98 D.L.R. 3d 52, 15 Av. Cas. (CCH) 17,687 (Can. 1979); *Milliken Trust Co.* v. *Iberia Lineas Aereas de Espagna, S.A.*, 11 Av. Cas. (CCH) 17,331 (N.Y. Sup. Ct. 1969), *aff'd without opinion*, 36 A.D.2d 582, 317 N.Y.S.2d 734 (1971); *Eck* v. *United Arab Airlines, Inc.*, 12 Av. Cas. (CCH) 18,427 (N.Y. Sup. Ct. 1974).

be entitled to avail himself of those provisions of this convention which exclude or limit his liability." App. 109a.

A divided panel of the Second Circuit held in *Lisi* that placing a "Lilliputian" and illegible statement of limited liability on the passenger's ticket is tantamount to failing to "deliver" a ticket as required by Article 3 of the Convention.[22] *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966) (Kaufman and Lumbard, J.J., with Moore, J., dissenting). Since no ticket had been "delivered," within the Second Circuit's meaning of that term, the limitation on the carrier's liability was extinguished. This Court granted certiorari to review *Lisi*, but ultimately affirmed without opinion because the Court was equally divided. 390 U.S. 455 (1968).

In *LOT*, the Second Circuit revisited the issue in light of the Montreal Agreement, which took effect in 1966. The Second Circuit held that "although [the Montreal Agreement] is actually a private agreement among carriers, it effectively modifies the Convention." 705 F.2d at 88. The statement required under Article 3(1)(e) of the Convention, as "effectively modifie[d]" must be in 10-point type. *Id.* at 89. Thus, in *LOT* the limit on the carrier's liability was extinguished because 8.5-point type was used. 705 F.2d at 86 & 91.

In the instant case, the Fifth Circuit, without substantive discussion, adopted the Second Circuit's ruling in *LOT*. The Fifth Circuit held that petitioner Pan Am could not invoke the limitation on its liability because the tickets, which were issued by Aerolineas Argentinas, were printed in 9-point type. App. 7a n.8, 46a & 91a.

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[22] The court relied on prior cases holding that poorly timed delivery (*e.g.*, after the passenger was on board or while boarding) was not proper delivery under Article 3(2). *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965).

The decisions of the Second and Fifth Circuits fail to address the meaning of the first sentence of Article 3(2), which provides that "The absence, *irregularity*, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." (Emphasis added.) Relying on that sentence, the United States Court of Appeals for the District of Columbia Circuit [23] has held that the limitation on the carrier's liability is not extinguished when the statement on the ticket is printed in type smaller than 10-point. *In re: Korean Air Lines Disaster of September 1, 1983*, No. 85-5982, Slip op. at 2, 4 (D.C. Cir. Sept. 25, 1987) ("KAL").[24]

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[23] The District of Columbia Circuit "adopt[ed] as our opinion the comprehensive July 25, 1985 Memorandum of the District Court" (slip op. at 4). The adopted decision of the district court is appended to the *KAL* slip opinion and is printed at 19 Av. Cas. (CCH) 17,584 (1985).

[24] The District of Columbia Circuit also traversed the Second Circuit's conclusion that the Montreal Agreement "effectively modifies" the Warsaw Convention, making it require 10-point type. In this regard, the District of Columbia Circuit said that the Montreal Agreement simply "*supplemented* the Article 3 requirements that a statement be included in the passenger ticket by providing specifics to be provided by carriers stopping in the United States . . . ." *KAL* slip op. app. at 27. (Emphasis added.) Under the Warsaw Convention, "it has been generally understood that in exchange for virtual strict liability against air carriers, international passengers are limited in their recovery." *Id.* at 26. Although the Montreal Agreement raised the liability limitation under Article 22 (App. 109a) and waived the air carrier's defenses under Article 20 (*Id.*), "it did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3." *Id.* at 27. Moreover, because the signatories to the Agreement were the air carriers and not the contracting parties to the Warsaw Convention, the District of Columbia Circuit held that they were incapable of altering or amending the Convention, which they apparently had not wanted to do in any event. *KAL* slip op. app. at 27-28.

The District of Columbia Circuit was persuaded by a decision of the Canadian Supreme Court which rejects the so-called "American" rule. In *Ludecke* v. *Canadian Pacific Airlines Ltd.*, 98 D.L.R. 3d 52, 15 Av. Cas. (CCH) 17,687 (Can. 1979), the Supreme Court of Canada held, *inter alia*, that under the Warsaw Convention:

> "the words of Article 3(2) are plain and can admit of no misunderstanding. The absence, irregularity, or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by Article [3]1(e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law." 15 Av. Cas. (CCH) at 17,690.[25]

Thus, as matters stand there is an intra-national and international split in authority interpreting Article 3(2) of the Warsaw Convention and the Montreal Agreement. The decision below and the decisions of the Second Circuit have been rejected by the Supreme Court of Canada and the District of Columbia Circuit because they ignore the first sentence in Article 3(2) and, in Judge Moore's words, amount to "judicial treaty-making." *Lisi*, 370 F.2d at 515; see also *KAL* slip op. app. at 28.

As a matter of United States law, the split among the circuits is worthy of review because there is a special need to ensure uniformity of law in air disaster cases. Air disasters usually produce damages suits in various federal circuits, and it is most unfortunate if not un-

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[25] See G. Miller, *Liability in International Air Transport* 87-88 (1977) (discussing French case predating *Ludecke* and taking the position, also taken in *Ludecke*, that under the Warsaw Convention, providing notice is not a prerequisite to obtaining the liability limitation).

acceptable when plaintiffs and defendants who are involved in the same accident or similar accidents are treated vastly different because two courts of appeals place different readings on a single treaty provision. Such considerations led the District of Columbia Circuit to state: "the proper interpretation of the Convention and Agreement . . . [is a] matter[] in need of definitive resolution for our national court system." *KAL* slip op. at 11.

The international split in authority adds to the need for review. When lower courts of the United States construe an international treaty in a manner that is squarely rejected by respected tribunals in other nations, the interest in fostering and preserving a uniform body of international law depends on this Court. One explicit purpose of this multilateral treaty is to regulate in "a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. . . ." App. 107a. That purpose remains unsatisfied so long as the courts of appeals disagree among themselves and disagree with the Supreme Court of Canada as to the outcome of the issue presented here.[26]

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[26] In petitioner's view, each of the issues presented here is worthy of review. If *certiorari* were denied on the *forum non conveniens* issue, the Warsaw issue would remain as a freestanding issue. If *certiorari* is granted on the *forum non conveniens* issue and the decision below is affirmed, or if the decision is reversed but the lower courts determine that the case was properly tried here, the Warsaw issue remains unaffected. If the Court grants *certiorari* on the *forum non conveniens* issue and reverses, and if the cases are ultimately dismissed to a foreign forum, Pan Am has agreed to waive the Warsaw liability limitation and the issue would then drop from the case. At that time and in those circumstances, the Warsaw Convention issue would be moot in the instant cases (although not in numerous others arising from this accident). The possibility of future mootness does not deprive the Court of the opportunity to resolve what is now a live con-

CONCLUSION

A writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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November 6, 1987

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troversy, however. *United States* v. *Sharpe*, 470 U.S. 675, 681-82 n.2, 105 S.Ct. 1568, 1573 n.2 (1985) ("had we thought that we should decline to reach every constitutional issue that might become moot, we would have denied certiorari."); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 692-93 n.32 (1979).

87-750

No. ———

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EDITOR'S NOTE

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 84-3832, 84-3833

IN RE AIR CRASH DISASTER NEAR
NEW ORLEANS, LOUISIANA ON JULY 9, 1982
LUIS ALBERTO TRIVELLONI-LORENZI, and
SUSANNA ELECTRA TRIVELLONI-LORENZI,
Plaintiffs-Appellees.

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Defendants-Appellants.

ERNESTO SERIO PAMPIN LOPEZ, Individually and
As Administrator of the Estate of
His Deceased Mother SARA E. LOPEZ DE PAMPIN,
Plaintiff-Appellee,

v.

PAN AMERICAN AIRWAYS, INC., and
UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants.

July 21, 1987

Appeals from the United States District Court
for the Eastern District of Louisiana

Deutsch, Kerrigan & Stiles, Francis G. Weller, Frederick R. Bott, Darrell K. Cherry, Robert E. Kerrigan, Jr., New Orleans, La., for defendants-appellants.

Stephen B. Murray, Romualdo Gonzalez, Patricia R. Murray, New Orleans, La., for plaintiffs-appellees.

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge: *

These consolidated cases arise from the crash shortly after takeoff of Pan American World Airways Flight 759 near New Orleans, Louisiana. The plaintiffs are foreign citizens who sought recompense for their injuries in a Louisiana federal court. Pan American World Airways, Inc. (Pan American) invoked the doctrine of forum non conveniens, insisting that the plaintiffs' home country of Uruguay is the proper forum for the resolution of plaintiffs' claims. We took these cases en banc to decide whether the district court properly applied the doctrine of forum non conveniens. For the reasons stated below, we hold the plaintiffs' causes of action were properly tried in a Louisiana federal court.

I.

On July 9, 1982, Pan American Flight 759 crashed in Kenner, Louisiana, shortly after takeoff from Moisant International Airport. All 154 persons aboard the plane perished. Eyewitness accounts established that seconds after takeoff Flight 759 suddenly descended and pitched to one side. The plane's wing struck a tree causing the wings to swing perpendicular to the ground. Within seconds the plane crashed exploding on impact. A later crash

* Unless otherwise indicated this opinion is joined by all members of the court.

investigation concluded that a microburst wind shear was a contributing cause to the accident.

Within weeks of this tragic accident, personal representatives of many of the deceased passengers filed wrongful death suits and survival actions in various United States district courts.[1] On August 12, 1982, plaintiffs filed their suits in the United States District Court for the Eastern District of Louisiana against Pan American, the Boeing Company (manufacturer of the airplane), and the New Orleans Aviation Board (operator of Moisant International Airport). Plaintiffs in these consolidated cases are citizens and residents of Uruguay, and are heirs of passengers killed in the crash of Flight 759. Luis Alberto and Susanna Electra Trivelloni-Lorenzi (Trivelloni children) brought suit for the wrongful death and as survivors of their parents Luis Alberto and Electra Iris Trivelloni who perished in the crash. Ernesto Serio Pampin Lopez (Pampin) brought suit for the wrongful death and as survivor of his mother Sara Lopez de Pampin, his sister Amparo Pampin Lopez, and his aunt Irma Lopez de Alvarez who perished in the crash. All of the decedents were citizens and residents of Uruguay who were on vacation in the United States.[2]

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[1] Of the numerous actions arising from this crash, approximately 52 were filed on behalf of 42 passengers of Flight 759 who were foreign nationals. Most of these actions were brought in California and Florida. On October 13, 1982, the Judicial Panel on Multidistrict Litigation transferred all federal actions arising out of this accident to the Eastern District of Louisiana for pretrial proceedings.

Pretrial proceedings in these cases were completed in late 1984, and on January 9, 1985, the Multi-district Litigation Panel remitted the cases to the courts in which they were originally filed for further proceedings.

[2] The deceased passengers had purchased their round trip tickets in Montevideo, Uruguay. Their tickets provided for a flight from Montevideo to the United States, flights within the United States,

Plaintiffs also intended to join the United States as a defendant, but they had to exhaust their administrative remedies under the Federal Tort Claims Acts (FTCA), 28 U.S.C. § 2671 *et seq.*, before doing so. On April 29, 1983, plaintiffs commenced their administrative claims against the United States. At the time plaintiffs initiated their administrative claims against the United States, they were not aware that on January 26, 1983, Pan American had indicated to the district court that Pan American and the United States were prepared to stipulate to liability. Plaintiffs did not have access to the information because it had been placed in a sealed minute entry. The information was not disclosed to plaintiffs until mid-summer of 1983, over one year after the crash.

At a pretrial hearing on July 29, 1983, Pan American advised the district court and plaintiffs that it intended to move to dismiss plaintiffs' cases on the ground of forum non conveniens. Pan American's counsel stated that "we're going to take the position that if liability is not an issue . . . that the damage issues in the foreign [plaintiffs'] cases belong in the countries from which they came. . . ." The district court instructed Pan American to file its motion to dismiss for forum non conveniens, but in an effort to expedite matters, the court informed Pan American that its motion would be denied. Recognizing that all the parties knew the United States was to be joined as a defendant after the administrative process was completed and anticipating such joinder, the district court stated:

> The government is a defendant; the government is going to remain a defendant. I can tell you how I'm going to rule on the motion, so we can go on to the next issue. Really, I'm going to rule that you have no right to that transfer, and I'm going to rule that

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and then a return flight to Montevideo. When Flight 759 crashed the decedents were en route to Las Vegas, Nevada, prior to returning home.

> that issue hanging there is not going to stop me from ruling on it, that I'm not going to do it, and you can sign the stipulations. We're going to go to trial here on damages, with the government as a defendant and with the crash happening here. . . . The crash was here, and the United States is a party.

On August 22, 1983, Pan American did file its motion to dismiss plaintiffs' cases on the ground of forum non conveniens.[3] In connection with the motion, Pan American stated that it would: (1) submit to jurisdiction of the courts of Uruguay, (2) concede liability, (3) waive any statute of limitations defense, (4) waive the Warsaw Convention's limitation of damages provision, and (5) guarantee satisfaction of any judgment entered against it in Uruguay. In its motion Pan American argued that the United States was an unnecessary party since Pan American had guaranteed payment of any judgment rendered against Pan American in Uruguay. The motion went on to contend that dismissal on the basis of forum non conveniens was proper because only the damages issue remained and that this issue could best be litigated in Uruguay. In a minute entry docketed September 6, 1983, the district court denied the motion. Pan American moved for reconsideration or alternatively for certification of the ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court denied both requests. Pan American petitioned this court for a supervisory writ of mandamus, but on January 18, 1984, we refused to issue the writ.[4]

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[3] Pan American also proferred its motion to dismiss on grounds of forum non conveniens as to all claims by or on behalf of foreign citizens arising from the crash of Flight 759 then pending in the Eastern District of Louisiana.

[4] Pan American suggested that the court, sitting en banc, should consider the petition for mandamus; however, no member of the court requested a poll on the suggestion.

On December 16, 1983, while Pan American was attempting to gain interlocutory review of the district court's denial of its motion to dismiss for forum non conveniens, plaintiffs, Pan American, and the United States entered into a stipulation as to liability, damages, defenses, and payment under any subsequent judgment.[5] As anticipated by the parties, plaintiffs' administrative claims under the FTCA were unsuccessful,[6] and on February 17, 1984, plaintiffs amended their complaints to make the United States a party defendant.[7] The final procedural posturing of these cases occurred when defendants Boeing Company and New Orleans Aviation Board were dismissed with prejudice pursuant to the December 16 stipulation.

With the parties to these actions finally aligned, the district court made several pretrial decisions on the law which would apply. The court held that Pan American had failed to show any significant difference between the law of Uruguay and Louisiana; therefore, the law of Louisiana would apply. The court, however, later granted Pampin's motion requesting that Uruguayan law apply insofar as it recognized a nephew's claim for the wrongful death of an aunt; Louisiana law recognized no such claim. The court also struck Pan American's defense that sought to invoke the damages limitations of the War-

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[5] The December 16 stipulation in the Trivelloni-Lopez case is reproduced in Appendix A to this opinion. A similar stipulation was also entered in the Pampin case.

[6] Plaintiffs received written notification that their claims against the United States had been denied on January 16, 1984. It was not until this time that plaintiffs could properly sue the United States. *See* 28 U.S.C. § 2675.

[7] In their amended complaints, plaintiffs alleged that the agents and employees of the Federal Aviation Administration, an agency of the United States, were negligent in operating the New Orleans International Airport tower and in disseminating information on weather conditions at the time of Flight 759's take-off.

saw Convention and the Montreal Agreement[8] because the notices of liability limitation on the plaintiffs' tickets were not furnished in the required ten-point type size.

Both the Trivelloni and Pampin cases went to trial on the same day. The trials were physically consolidated while the juries heard from two witnesses to the crash and from an anthropological expert who testified as to South American mores and familial relationships. The trials were then separated for presentation of evidence particular to each family. The Trivelloni jury awarded $25,000 each for the pre-impact pain and suffering of Luis and Electra Trivelloni, $75,000 to each Trivelloni child for the death of their parents, and $3,530 for loss of their parents' personal effects, for a total of $203,530. The Pampin jury awarded $25,000 for the pre-impact pain and suffering of each of Ernesto Pampin's deceased relatives, $12,000 for the post-impact pain and suffering of Pampin's aunt Irma Lopez de Alvarez, $250,000 for the death of his mother, $150,000 for the death of his sister, $13,000 for the death of his aunt, and $16,853.89 for loss of his relatives' personal effects, for a total of $516,853.89. The district court entered judgment in each case against Pan American and the United States consistent with the verdicts and denied all post-trial motions.

On appeal a panel of this court affirmed the district court's denial of Pan American's motion to dismiss for forum non conveniens, affirmed the district court's decision to apply Louisiana law to the damages issues with the exception that Uruguayan law would apply to permit Pampin recovery for the death of his aunt, and affirmed the district court's refusal to apply the Warsaw Convention/

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[8] The Warsaw Convention, 49 U.S.C. § 1502 note, as modified by the Montreal Agreement, restricts damages to $75,000 for any wrongful death of an international air passenger if certain notification prerequisites are carried out. *See* CAB Order E-23680, 31 Fed.Reg. 7302 (1966). *See generally In re Air Crash at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845, 104 S.Ct. 147, 78 L.Ed.2d 138 (1983).

Montreal Agreement damage limitation.[9] *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 789 F.2d 1092 (5th Cir. 1986). As to the damages awarded, the panel affirmed the award of pre-impact pain and suffering for each family victim but based upon the evidence ordered a remittitur to $7,500 for each decedent or alternatively a new trial. *Id.* at 1099. The award of post-impact damages to Pampin for the pain suffered by his aunt was affirmed as was the award to Pampin for the loss of his mother.[10] *Id.* at 1100. The panel affirmed the damage award given to Pampin for the loss of his sister but ordered a remittitur to $50,000 or, alternatively, a new trial. *Id.* at 1100. Finally, the panel affirmed the district court's award of prejudgment interest against Pan American but reversed the prejudgment interest award against the United States because such award was prohibited by federal statute. *Id.* at 1101 (citing 28 U.S.C. § 2674).

Neither party was particularly pleased with the outcome of the panel decision. Plaintiffs applied for panel rehearing on the issue of the remittiturs of the awards for pre-impact damages. Pan American applied for en banc rehearing on the forum non conveniens issue pursuant to Fed.R.App.P. 35 and Loc.R. 35. We granted rehearing en banc to consider particularly the forum non conveniens issue. *In re Air Crash Near New Orleans, Louisiana on July 9, 1982*, 795 F.2d 381 (5th Cir. 1986).

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[9] In addressing the forum non conveniens issue, the panel first performed a choice-of-law analysis. The panel concluded that Louisiana law was correctly applied to most elements of the damages. *In re Aircrash*, 789 F.2d at 1097 (citing *Restatement (Second) on Conflicts of Laws* §§ 175, 178 (1982)). Since American law applied, the panel stated that the district court's ruling would be upheld unless the cases were more properly tried in a foreign forum. In light of the issues involved, the panel decided that Louisiana was the proper forum in which these cases should be heard. *Id.* at 1098.

[10] The damages given to the Trivellino [sic] children for the loss of their parents were also affirmed without remittitur.

Several issues relating to the doctrine of forum non conveniens are raised in this appeal. We will address the following questions: (1) In applying forum non conveniens in a diversity action, does a federal court apply the forum non conveniens law of the state in which it sits or federal forum non conveniens law; (2) Can a federal district court apply the doctrine of forum non conveniens in a case governed by the Warsaw Convention; (3) If federal law applies, what are the requirements of the doctrine of forum non conveniens; (4) How should the doctrine be applied by a district court; (5) What is our standard of review; and, finally (6) Was the doctrine applied properly in these cases. We now turn to a discussion of each issue.

II.

The doctrine of forum non conveniens rests upon a court's inherent power to control the parties and cases before it and to prevent its process from becoming an instrument of abuse or injustice. Through this power a federal trial court may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, where it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 530, 67 S.Ct. 828, 835, 91 L.Ed. 1067 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 842, 91 L.Ed 1055 (1947). The doctrine arose in the areas of admiralty and equity, but it is now applied in a wide spectrum of cases in both federal and state courts.[11] *Compare Syndicate 420 At Lloyd's London*

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[11] For the history and evolution of the doctrine from its Anglo-Scottish origins, *see* Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal.L.Rev. 380 (1947); Bickel, *The Doctrine of Forum Non Conveniens as Applied to the Federal Courts in Matters of*

v. Early American Insurance Co., 796 F.2d 821, 825 (5th Cir. 1986) (maritime insurance contracts case) *with Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 359-60 (6th Cir. 1985) (strict liability pharmaceutical case). *See generally* Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 Va.J.Int'l L. 755 (1977). Before we examine the forum non conveniens analysis that is to be applied in these cases, we must address two preliminary matters.

A.**

First, since these cases are based upon diversity jurisdiction, we are faced with the question of whether we are bound by Louisiana forum non conveniens law or federal forum non conveniens law under the teachings of *Erie RR. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Several courts, including the Supreme Court, have declined to decide whether, under *Erie*, state or federal law of forum non conveniens applies in diversity cases. *See Piper Aircraft Co. v. Reyno*, 454 U.S. at 248 n. 13, 102 S.Ct. at 262 n. 13; *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 509, 67 S.Ct. at 843; *De Melo v. Lederle Laboratories*, 801 F.2d 1058, 1061 n. 2 (8th Cir. 1986). On each of these occasions the courts reasoned that the issue need not be decided because the state and federal forum non conveniens law were virtually identical. *Piper Aircraft Co. v. Reyno*, 454 U.S. at 248 n. 13, 102 S.Ct. at 262 n. 13; *Gulf Oil Corp*, 330 U.S. at 509, 67 S.Ct. at 843; *De Melo*, 801 F.2d at 1061 n. 2. *See also Schertenleib v. Traum*, 589 F.2d 1156, 1162 n. 13 (2d Cir. 1978) ("intriguing question" need

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Admiralty, 35 Cornell L.Q. 12 (1949); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum.L.Rev. 1 (1929); Note, *The Convenient Forum Abroad*, 20 Stan.L.Rev. 57 (1967).

** Judge Higginbotham does not join in this section of the opinion.

not be addressed because federal and New York law the same). In this case, however, Louisiana forum non convenience law is substantially different than federal forum non conveniens law.[12] We must therefore decide whether the district court in this case was obliged to apply either the federal or Louisiana law of forum non conveniens.

A Louisiana court has recently discussed the state's forum non conveniens law. In *Kassapas v. Akron Shipping Agency, Inc.*, 485 So.2d 565 (La.Ct.App. 5th Cir.), *writ denied*, 488 So.2d 203 (La.), *cert. denied*, —— U.S. ——, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986), the issue before the court was whether Louisiana courts may, absent statutory authorization, conditionally dismiss a suit to a foreign country on the ground of forum non conveniens. The Louisiana Court of Appeals answered emphatically in the negative. The *Kassapas* court first noted that the common law doctrine of forum non conveniens was almost non-existent in Louisiana jurisprudence as a result of the state's French legal heritage. *Id.* at 566; *see also* Pausen & Burrick, *Forum Non Conveniens in Admiralty*, 13 J.Mar.L. & Com. 341, 363 (1982) ("The doctrine of forum non conveniens is alien to French law."). In a leading case on forum non conveniens dismissal in Louisiana, the court stated "that the doctrine of forum non conveniens is foreign to our jurisprudence and contrary to express legislative declaration." *Trahan v. Phoenix Insurance Co.*, 200 So.2d 118, 122 (La.Ct.App. 1st Cir.), *cert. denied no error of law*, 251 La. 47, 202 So.2d 657 (1967); *see also Chaney v. Williher*, 205 So.2d 770, 771 (La.Ct.App. 1st Cir. 1967), *cert. denied*, 251 La. 940, 207 So.2d 541 (1968).

The *Kassapas* court, however, noted that the Louisiana Legislature had responded to *Trahan* by adopting article

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[12] For a description and discussion of federal forum non conveniens laws see *infra* parts III A, B.

123 of the Louisiana Code of Civil Procedure. Article 123 provides:

> For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought, provided, however, that no suit brought in the parish of which the plaintiff is domiciled and which court is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this article.

The *Kassapas* court reasoned that article 123 only authorized transfer between Louisiana district courts. The court stated:

> [T]he Legislature added what is now La. Code Civ. Pro. art. 123, to provide for forum non conveniens transfer from one district court to another. That article does not provide for transfer to a foreign forum, nor does it permit forum non conveniens dismissal. In this court's opinion, the *Trahan* holding that the common law or federal doctrine of forum non conveniens does not exist in our law is still viable, except to the limited extent art. 123 authorizes transfer from one district court to another within the State of Louisiana.

Kassapas, 485 So.2d at 566.

Finally, the *Kassapas* court refused to follow either *Smith v. Globe Indemnity Company*, 243 So.2d 882 (La. Ct.App. 1st Cir. 1971), or *Symeonides v. Cosmar Compania Naviera*, 433 So.2d 281 (La.Ct.App. 1st Cir. 1983), since their statements that forum non conveniens transfer or dismissal to a foreign forum might be allowable under article 123 were dicta and unsupported by statutory language. Both *Smith* and *Symeonides* applied the

federal "balancing of conveniences" approach to forum non conveniens motions.

Since *Kassapas* is the last and most definite statement on Louisiana forum non conveniens law, we believe it is reasonable to consider it the current law in Louisiana for *Erie* analysis. *See Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1351, 1360 (5th Cir. 1983), *cert. denied*, 465 U.S. 1028, 104 S.Ct. 1288, 79 L.Ed.2d 690 (1984). Thus, if we are bound to apply the Louisiana rule as a diversity court, our inquiry would end and the district court would be affirmed, albeit on different grounds. We cannot, however, under *Erie* take this expeditious avenue toward resolution of this appeal. We turn then to the difficult *Erie* question presented.

It is often said that the "general rule" is that federal diversity courts "apply state substantive law and federal procedural law"; and indeed the statement is roughly accurate. This general rule however only describes the *outcome* of *Erie* analysis. What we classify as "substantive" are precisely those matters governed by state law—and as "procedural" those matters governed by federal law—in federal diversity cases.[13] Moreover, the normal

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[13] Justice Frankfurter warned us against reifying the "substance/procedure" labels long ago:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problems for which it is used. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to *ex post facto* legislation, the impairment of obligations of contract, the enforcement of federal rights in the state courts and the multitudinous phases of the conflict of laws.
>
> And so, putting to one side abstractions regarding "substance" and "procedure," we have held that in diversity cases the fed-

meanings of the words "substance" and "procedure" will not always stretch to provide the appropriate *Erie* label, but that has not kept us from applying, for example, state "procedural" rules in a diversity case. *See, e.g., Conway v. Chemical Leaman Lines, Inc.*, 540 F.2d 837, 839 (5th Cir. 1976) (*Erie* policies require application of state rule evidence in diversity case). Thus it has been stated that *Erie* is "[a] policy so important to our federalism [that it] must be kept free from entanglements with analytical or terminological niceties." *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945).

Again, as a general proposition, we often hear the abstract definition of "substantive rules" as those "which establish the rights of parties and generally determine the outcome of litigation." Under this definition we would be hardpressed to hold that *forum non conveniens* is "procedural" because, as a practical matter, only an outright dismissal with prejudice could be more "outcome determinative" than a conditional dismissal to a distant forum in a foreign land. But the question is obviously not so simple. As we have noted, the Supreme Court has assiduously avoided deciding whether state or federal law controls a *forum non conveniens* determination in a federal diversity court, and respected authority exists for both views. *Compare, e.g. Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied* —— U.S. ——, ——, 106 S.Ct. 347, 348, 88 L.Ed.2d 294 (1985) (federal law of *forum non conveniens* applies in diversity cases because doctrine is procedural) *with Weiss v.*

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eral courts must follow the law of the State as to burden of proof, as to conflict of laws, as to contributory negligence. *Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts.

Guaranty Trust Co. v. York, 326 U.S. 99, 108-10, 65 S.Ct. 1464, 1469-70, 89 L.Ed. 2079 (1945) (citation omitted).

Routh, 149 F.2d 193, 194-95 (2d Cir. 1945) (state law controls *forum non conveniens* question in diversity case);[14] *see also* Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J.Mar.Law & Com. 185 (1987) (collecting numerous cases going both ways). *See generally* 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3828, at 194 (2d ed. 1986) ("Although the Supreme Court has repeatedly found that it did not need to decide whether state notions of forum non conveniens were binding on a federal court in a diversity action, it seems quite clear that they ought not to be and that these are matters of the administration of the federal courts, not rules of decision, so that state rules cannot be controlling.").

The fact that Louisiana courts have labeled the *forum non conveniens* doctrine "procedural" does not decide the *Erie* question of whether a federal court sitting in diversity applies state or federal notions of forum non con-

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[14] Learned Hand's brief formulation of the argument is, as usual, persuasive:

> It might be argued that those considerations which will set a court in motion are peculiar and personal to itself, and that it does not follow that what is enough to move a state court to act, should be enough to move a federal; or vice versa. Such a doctrine would, however, imply that the decision to accept jurisdiction is not controlled by any principle and may be at the judge's whim; and that would certainly be too strong a statement. Here, as elsewhere, although judicial discretion does indeed imply that the limits are not rigidly fixed, it does not mean that there are none; and in dealing with the question at bar, we are to remember the purpose of conformity in "diversity cases." It is that the accident of citizenship shall not change the outcome: a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does. For this reason it seems to us that we should follow the New York decisions.

149 F.2d at 195.

veniens. As Justice Frankfurter said when considering another question under *Erie:*

> It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts.

Guaranty Trust, 326 U.S. at 109, 65 S.Ct. at 1470. State decisions can be helpful but they cannot be used as a substitute for *Erie* analysis. The state courts may have slapped the "procedure" label on an issue for purposes that are completely divorced from the policies underlying *Erie*.

Since the "general rules" are not of substantial aid in resolving the *Erie* question before us, we go back to the beginning—*Erie Railroad v. Tompkins*—to decide whether state or federal law controls the *forum non conveniens* issue in a federal diversity court. The narrow holding of *Erie* was that neither Congress nor the federal courts have power under the Constitution "to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). It soon became clear, however, that the *Erie* doctrine was not confined to the question of federal power. By the time of *Guaranty Trust* the Supreme Court spoke only of the *Erie* "policy," and the opinion gave no suggestion that the rationale of *Erie* should be confined to rules that the federal courts lacked the constitutional power to create. In *Hanna v. Plumer*, the Court stated *Erie* policy encompassed "the twin aims of . . . discouragement of forum-shopping and avoidance of the inequitable admin-

istration of the laws." 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965).

Therefore, our task is to evaluate whether applying federal *forum non conveniens* in this case advances or hinders the "twin aims" of *Erie*. But first, two clarifications are in order. One, the "forum-shopping" concern is not really the problem of forum-shopping in itself. After all, the purpose of diversity jurisdiction is to *allow* a certain kind of forum-shopping. Rather, the "forum-shopping" concern for *Erie* purposes is the unfairness of giving one set of plaintiffs (those who can sue in federal court) some particular advantage unavailable to non-diverse plaintiffs who must proceed in state court. Two, the *Hanna* Court's second purpose—"inequitable administration of the laws"—is ambiguous. This purpose may refer either to extrinsic considerations of the fairness of the competing state and federal rules to the parties—"*inequitable* administration"—or to intrinsic considerations of the federal forum's own interests—"inequitable *administration*." We conclude that *Hanna* intends the latter. The former interpretation would take federal courts into an analysis of the "fairness" of the state rule, in other words, its wisdom and propriety. This could only lead to normative assertions by federal courts that a given state law cannot be applied because to do so would be "inequitable." But it was precisely this normative role, this role of federal courts as prophets of a "brooding omnipresence," that *Erie* condemned. Therefore, *Hanna*'s second aim must refer to the federal courts' own interests in equitable self-administration.

Because almost any difference between the rules applied in state and federal courts can lead to different outcomes and "forum-shopping"—the ability of diversity plaintiffs to gain advantages denied to others—the first aim of *Erie* is always best satisfied by applying state law. To determine the importance of this aim for a particular issue, the question is always "how different will the out-

comes be?" If Louisiana courts refuse to dismiss on *forum non conveniens* grounds, and if that doctrine does not apply to a Louisiana cause of action in a federal diversity court, there will be a tremendous disparity of result between trials in the two court systems. One case will proceed to judgment and the other will be dismissed to a foreign land.

Here we face a twist on the usual problem. The usual problem of forum-shopping in the *Erie* context is the ability of *plaintiffs* to choose an advantageous federal forum; there is an obvious inequity in allowing out-of-state plaintiffs advantages over local plaintiffs in suits under the same substantive law of the forum state. However, the occasional state court that refuses to apply *forum non conveniens*—like Louisiana—becomes the advantageous forum for some relevant group of both local and non-resident plaintiffs. Thus, the differing state and federal rules contemplated by this case have no forum-shopping implications for plaintiffs. But there will be diversity between the parties in many such cases. Defendants in those cases will be able to remove the case to federal court, negating any plaintiff's advantage. Thus, our decision today will give some (arbitrary) set of *defendants* the ability to "forum-shop," *i.e.*, to receive an advantage in the federal court unavailable to the defendants who must remain in the state court. But this defendant-forum-shopping twist does not alter the unavoidable conclusion: The enormous difference between the outcomes of state and federal proceedings points forcefully toward applying state law under the first aim in *Erie*.

On the other hand, the interests of the federal courts in maintaining the federal doctrine even in a diversity case are powerful. We can describe those interests no better than has a panel of our colleagues on the Eleventh Circuit:

> The doctrine [of *forum non conveniens*] derives from the court's inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression.
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> * * * * * *
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> The doctrine addresses "whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum" *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 530, 67 S.Ct. 828, 834-35, 91 L.Ed. 1067 (1947). . . .
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> * * * * * *
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> The Court's interest in controlling its crowded docket also provides a basis for the Court's inherent power to dismiss on grounds of *forum non conveniens:* "the 'chosen forum is inappropriate because of consideration affecting the court's own administrative and legal problems.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. [235,] at 241, 102 S..Ct. [252,] at 258 [70 L.Ed.2d 419 (1981)] (quoting *Koster v. Lumbermans Mutual Casualty Co.*, 330 U.S. at 524, 67 S.Ct. at 831-32). "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 590-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). The *forum non conveniens* doctrine is "designed in part to help courts avoid conducting complex exercises in comparative law," *Piper Aircraft Co.*, 454 U.S. at 251, 102 S.Ct. at 263. . . .

Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1218-19 (11th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985) (brackets in original omitted). Federal forum interests in self-management point force-

fully toward applying federal law under the second aim of *Erie*.

Our analysis of *Erie*'s twin aims in the context of selecting state or federal forum non conveniens law produces conflicting indications on how to resolve the issue. The aim of dissuading forum-shopping says apply Louisiana law in this diversity case. The other aim says apply federal law as a matter of internal consistency and administration. We have seen this kind of problem before. We have held that the sufficiency of the evidence is a federal question in a diversity court precisely because the federal forum's interest in self-management overrides uniformity concerns:

> Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve the "essential character" of the federal judicial system. Of course, we do not contend that this control will not affect state-created substantive rights in some cases. Ultimately, however, the integrity of our fact-finding processes must outweigh considerations of uniformity.

Boeing Co. v. Shipman, 411 F.2d 365, 369-70 (5th Cir. 1969) (en banc). The holding of *Boeing* has been extended to other aspects of the judge-jury relationship without discussion of the *Erie* problems involved. For example, under Mississippi law the trial judge must first determine for himself that a defendant insurer had no "reasonably arguable" basis for denying coverage before submitting the question of punitive damages to the jury. *Blue Cross & Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 842 (Miss. 1985). We have refused to apply that standard in diversity cases, *Jones v. Benefit Trust Life Insurance Co.*, 800 F.2d 1397, 1400 (5th Cir. 1986) (*Boeing* is the appropriate standard; no discussion of *Erie*), even though the state standard clearly involves

important substantive state policies of insurance regulation, and even though the federal standard will consistently skew the results of claims for punitive damages in favor of plaintiffs. The result in *Jones* may be inconsistent with *Byrd v. Blue Ridge Rural Electric Corp.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). *Byrd* held that federal law could override an inconsistent state procedure only when the state "requirement appears to be merely a form or mode of enforcing the immunity, and not a rule intended to be bound up with the definition of the rights and obligations of the parties." 356 U.S. at 536, 78 S.Ct. at 900. We think, in the light of later authority, that *Byrd* gave too little recognition to the federal forum-*qua*-forum interests. Compare *Hanna v. Plumer*, which held that Congress has the power to override state law by the Federal Rules in "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U.S. at 472, 85 S.Ct. at 472. *Hanna* gives us good reason to hold that federal courts have inherent powers under Article III to displace state laws on matters involving their basic competence as courts. *Boeing* and *Jones* are correct because the relationship between judge and jury goes to the heart of the independence and integrity of an Article III court.

Thus we face a difficult *Erie*-doctrine choice. We must choose between maintaining important internal administrative and equitable powers of our courts at the cost of disuniformity of result between state and federal diversity courts, or uniformity at the cost of giving up part of our self-regulatory powers. It is fashionable to call a difficult choice between important objectives a "balancing" test, but we decline to resort to this metaphor. It is simply a matter of choice, and choose we must.

We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disrup-

tion of uniformity created by applying federal *forum non conveniens* in diversity cases. We are far down this road already, having made a series of similar choices in cases such as *Boeing Co. v. Shipman* and its progeny. We think those choices were correct. We therefore hold that a federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum.[15]

B.

Having decided which forum non conveniens law is to be applied, we next address whether the district court in

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[15] While federal law of forum non conveniens is to be applied in diversity cases, we note that the availability of the doctrine of forum non conveniens has been greatly restricted. Only when the more convenient forum is a foreign country can a suit brought in a proper federal venue be dismissed on grounds of forum non conveniens. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3828, at 279-80 (2d ed. 1986); *see also Pain v. United Technologies Corp.*, 637 F.2d 775, 784-85 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981); *Schertenleib v. Traum*, 589 F.2d 1156, 1159 (2d Cir. 1978).

If the motion seeks a change of forum within the federal system, 28 U.S.C. § 1404(a) applies instead of the common law doctrine of forum non conveniens. Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In addressing the distinction between section 1404(a) and the forum non conveniens doctrine, the Supreme Court stated:

> Congress enacted § 1404(a) to permit change of venue between federal courts. Although the statute was drafted in accordance with the doctrine of forum non conveniens, it was intended to be a revision rather than a codification of the common law. District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of forum non conveniens.

Piper Aircraft Co. v. Reyno, 454 U.S. at 253, 102 S.Ct. at 264-65 (citations omitted). *See generally* Fitzpatrick, *"Reyno": Its Progeny And Its Effects On Aviation Litigation*, J. Air L. & Com. 539, 542-43 (1983).

this case had the power to apply the doctrine. Plaintiffs contend that the common law doctrine of forum non conveniens as it exists in the federal system may not be applied to an action governed by the Warsaw Convention since article 28(1) of the Convention vests the absolute choice of forum in a plaintiff. The plaintiffs' position is a unique argument which our research indicates has never been addressed much less decided.[16]

At the outset we recognize that the parties agree that the provisions of the Warsaw Convention are applicable to these actions. The parties concurred at a pretrial hearing that the plaintiffs' deceased relatives were passengers in international air transportation. Furthermore, Pan American attempted to impose, albeit unsuccessfully, the damage limitation of the Convention since international air travel was involved in this crash. By its express terms the Convention is applicable to all persons travelling internationally by air.[17] We therefore

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[16] We have found but one case in which this argument has been raised. An amicus curiae argued that the district court could not invoke the doctrine of forum non conveniens to deprive a plaintiff of the right to litigate in the United States, a proper Warsaw Convention forum. *See Irish National Insurance Co. Ltd. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984). The Second Circuit declined to decide the issue.

Furthermore, some courts have simply applied the forum non conveniens doctrine without addressing the possible effect of section 28(1) of the Warsaw Convention. *E.g., McLoughlin v. Commercial Airways (PTY) Ltd.*, 602 F.Supp. 29, 33 (E.D.N.Y. 1985).

[17] Article 1, section 1, of the Convention provides:

> This convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire. . . .

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note, at 430.

The Convention in article 1, section 2, defines international air travel as transportation that (1) begins in one sovereign nation

conclude that the Convention is applicable to the plaintiffs' causes of action.[18] *See Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 853-54 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed.2d 64 (1965); *Hill v. United Airlines*, 550 F.Supp. 1048, 1054 (D.Kan. 1982).

The issue before us is whether the Warsaw Convention suspends a federal court's power to apply the doctrine of forum non conveniens in a case governed by the Convention. The Warsaw Convention of 1929 is a multilateral treaty that regulates claims for damages and other disputes which arise between passengers and international air carriers. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L. Rev. 497 (1967). The Convention provides for ticketing and baggage standards, freight shipment regulations, carrier liability, liability limitations, and, of particular interest in this case, jurisdictional requirements. The United States adopted the treaty in 1934.[19] Commenta-

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and ends in another, or (2) begins and ends in the same nation but with stops in other nations. *Id.* The plaintiffs' deceased relatives' travels fall into this latter category.

[18] It might be argued that a party must plead a cause of action under the Convention before its provisions would be applicable. *Cf. Boehringer-Mannheim Diagnostics v. Pan Am World Airways*, 737 F.2d 456, 458 (5th Cir. 1984) (Warsaw Convention creates cause of action), *cert. denied*, 469 U.S. 1186, 105 S.Ct. 951, 83 L.Ed.2d 959 (1985). The plaintiffs have not affirmatively pled causes of action arising under article 17 of the Convention. *See* 49 U.S.C. § 1502 note, at 433 ("The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . . ."). We do not believe the Convention should be read so narrowly especially in light of its overall intent to establish a uniform system for treatment of international air travel disputes. *See Mertens*, 341 F.2d at 854-56 (applying Convention to diversity case without pleading of Convention cause of action); *Hill*, 550 F.Supp. at 1053-54 (same).

[19] As a ratified treaty of the United States the Warsaw Convention is equal in stature and force as any other domestic federal

tors are in general agreement that the delegates to the Convention were most concerned with limiting the locations in which an air carrier would have to defend an action, with ensuring that an injured party have an available forum in which to redress his injuries, and with allowing the suit to be heard in a forum that had some interest in the dispute.[20]

As a manifestation of these concerns, article 28(1) of the Convention establishes four national forums in which an injured party may bring suit for damages inflicted by an international air carrier. Article 28(1) reads:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

The delegates, however, recognized that the Convention's provisions would have to be applied and adopted to a variety of legal systems, so they provided in article 28 (2) that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." [21]

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law. *See Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971).

[20] *See generally* McHenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205 (1963); Lowenfeld & Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497 (1967); Robbins, *Jurisdiction Under Article 28 Of The Warsaw Convention*, 9 McGill L.J. 352 (1963); Note, *Article 28 of the Warsaw Convention: A Suggested Analysis*, 50 Minn.L.Rev. 697 (1965-66).

[21] These two sections have been construed as creating three stages of analysis for determining where a damage suit arising from an international air transportation accident should be heard. The first stage is whether jurisdiction in the international or treaty sense is

Plaintiffs insist that article 28(1)'s language "at the option of the plaintiff" grants them the absolute and inalterable right to choose the national forum in which their claims will be litigated. We cannot agree. We are of the opinion that article 28(1) offers an injured passenger or his representative four forums in which a suit for damages may be brought. The party initiating the action enjoys the perogative of choosing between these possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws. *See Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971); *Mertens*, 341 F.2d at 855-56; *Hill*, 550 F.Supp. at 1054.[22] As one com-

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established. Treaty jurisdiction is dependent upon whether the lawsuit is in the proper country or "place" as provided in section 28(1). *Smith v. Canadian Pacific Airways*, 452 F.2d 798, 800 (2d Cir. 1971). The "places" for suit under 28(1) speak to nation-states and not to areas within nation-states. *Mertens v. Flying Tigers Line, Inc.*, 341 F.2d 851, 855 (2d Cir. 1965). The second stage queries, assuming treaty jurisdiction is established, whether a court within the chosen national forum has jurisdiction. The court chosen within the national forum must have jurisdiction under the domestic law of that forum. *Hill v. United States*, 550 F.Supp. 1048, 1053 (D.Kan. 1982). Finally, the appropriateness of the domestic court to hear the claim is determined by the local law of the forum, i.e. venue. *Smith*, 452 F.2d at 800 ("It is only after jurisdiction in both senses is had that the question of venue is reached and a determination made regarding the appropriateness and convenience for the parties of a particular domestic court."); *Hill*, 550 F.Supp. at 1053 ("[W]e hold that the Warsaw Convention does not effect the court's jurisdiction or venue beyond affirming that this suit may properly be heard by a court located within the territorial limits of the United States.").

[22] We recognize that the above-cited cases do not involve forum non conveniens motions to transfer or dismiss after a Warsaw Convention forum has been selected. *See also Commercial Union Insurance Co. v. Pan American World Airways, Inc.*, 17 Avia.Cas. (CCH) 17,652, 17,653 (N.Y.Sup. 1982). Our research indicates no such cases exist. We believe however that they demonstrate the reluctance of American courts to hold that domestic procedural

mentator on the Convention has stated: "No evidence can be found anywhere that the drafters of the Convention intended to alter the judicial system of any country." Robbins, *Jurisdiction Under Article 28 Of The Warsaw Convention*, 9 McGill L.J. 352, 355 (1963). We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens.

If we were to adopt the plaintiffs' construction of article 28(1) and ignore the language of article 28(2), American courts could become the forums for litigation that has little or no relationship with this country.[23] The plaintiffs' interpretation of article 28(1) cuts against the Convention's underlying purpose of ensuring that a dispute arising out of an air travel accident is litigated in a forum that has an actual interest in the matter. *See* McHenry, *Judicial Jurisdiction Under The Warsaw Convention*, 29 J.Air L. & Com. 205 (1963).

For the above reasons, we hold that article 28(1) of the Warsaw Convention does not prevent a district court from considering and applying the doctrine of forum non conveniens.

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law is unavailable in a case to which the Convention applies. Our holding today on the Convention issue embodies this same reluctance.

[23] A simple example will be illustrative. Suppose a Canadian citizen while visiting New York buys a ticket for a Montreal-Frankfurt-Montreal trip on Lufthansa, a German airline corporation doing business in New York. After eight hours of trans-Atlantic flight, the Lufthansa flight carrying our Canadian citizen crashes on the flat coastal plains of northern France near Calais. The surviving widow of the unfortunate Canadian citizen sues Lufthansa in the Southern District of New York for wrongful death of her husband. Her selection of the United States as the Warsaw Convention forum is appropriate since the ticket was purchased in New York. Subject matter jurisdiction and personal jurisdiction exist in the New York forum under federal law. Under plaintiffs' interpretation of article 28(1) the suit would have to be litigated in New York despite the case's limited relationship with the United States.

III.

Having decided the district court in this case should and could apply the federal law of forum non conveniens, we now determine, first, what is the federal law of forum non conveniens, second, how should it be applied by a district court, and, third, what is our standard of review on appeal from a denial of a motion to dismiss for forum non conveniens.

A.

In outlining the appropriate forum non conveniens analysis to be applied in these cases, we begin with the Supreme Court's seminal cases of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), and *Koster v. American Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947). *Gulf Oil* and *Koster* established the general principle "that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized." *Gulf Oil Corp.*, 330 U.S. at 507, 67 S.Ct. at 842. The Court stated that in deciding to exercise or decline jurisdiction "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster*, 330 U.S. at 527, 67 S.Ct. at 833. The determination of what is most convenient rests upon several private and public factors which the Court stated should be considered and balanced by a court when presented with a motion to dismiss for forum non conveniens.

> The private interests to be considered are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses; probability of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.

Gulf Oil, 330 U.S. at 508, 67 S.Ct. at 843. The public interest factors include the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-09, 67 S.Ct. at 843. The Court in both *Gulf Oil* and *Koster* emphasized that no one private or public interest factor should be given conclusive weight and that the plaintiff's initial choice is usually to be respected.[24]

The Supreme Court has recently reaffirmed the principles enunciated in *Gulf Oil* and *Koster* as appropriate for use in diversity cases. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). While discussing the forum non conveniens doctrine within the context of a diversity case, the Supreme Court recognized no exceptions to its general pronouncements on the doctrine. *See Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021, 1033-35 (N.D.Cal. 1985). We therefore are of the opinion that the principles enunciated in *Reyno* apply in *all* cases regardless of their jurisdictional bases or subject matter.[25]

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[24] It has been suggested in the parties' briefs that *Gulf Oil* and *Koster* established different standards for dismissal on grounds of forum non conveniens because the Court utilized different language in addressing the issue. We believe this argument is meritless and agree with the District of Columbia and Second Circuits that the two cases establish a single "balancing of conveniences" approach. *See Pain v. United Technologies Corp.*, 637 F.2d 775, 783 (D.C.Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981); *Alcoa Steamship Co., Inc. v. M/V NORDIC REGENT*, 654 F.2d 147, 154-58 (2d Cir.), *cert. denied*, 449 U.S. 890, 101 S.Ct. 248, 66 L.Ed.2d 116 (1980).

[25] We recognize that in Jones Act and general maritime cases we have in the past utilized a modified analysis on forum non con-

In *Reyno* the Court emphasized that prior to balancing the public and private interests enunciated in *Gulf Oil*, a court must decide whether another adequate forum is

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veniens issues. *See McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313, 1317 (5th Cir. 1986); *James v. Gulf Int'l Marine*, 777 F.2d 193, 194 (5th Cir. 1985); *Cuevas v. Reading & Bates Drilling Co.*, 770 F.2d 1371, 1377-78 (5th Cir. 1985); *Ali v. Offshore Co.*, 753 F.2d 1327, 1330 (5th Cir. 1985); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984); *In re McClelland Engineers, Inc.*, 742 F.2d 837, 838 (5th Cir. 1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985); *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 218 (5th Cir. 1984); *Gahr Developments, Inc. v. Nedlloyd Lijnen, B.V.*, 723 F.2d 1190, 1192 (5th Cir. 1984); *Diaz v. Humboldt*, 722 F.2d 1216, 1217 (5th Cir. 1984); *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861-62 (5th Cir. 1983); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843, 845-46 (5th Cir. 1983); *Bailey v. Dolphin Int'l Inc.*, 697 F.2d 1268, 1274 (5th Cir.), *reh'g denied*, 710 F.2d 837 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 (5th Cir.), *reh'g denied*, 710 F.2d 207 (5th Cir. 1983); *Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107, 1108 (5th Cir. 1982); *Volyrakis v. M/V ISABELLE*, 668 F.2d 863, 866 (5th Cir. 1982); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1017-18 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982); *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied*, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981). *See also Liaw Su Teng v. Skaarup Shipping Co.*, 743 F.2d 1140, 1145 (5th Cir. 1984) (applying similar analysis in non-Jones Act maritime case).

In these cases we have begun the forum non conveniens analysis by first determining whether United States law governs the actions. This decision is made by considering the factors enunciated by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); *Romero v. International Terminal Operations Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); and *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970). If the court determines that United States law does apply, it ordinarily keeps the case. If the court determines that United States law does not apply, the court balances the private and public convenience factors enunciated in *Gulf Oil* and *Reyno*. *See Ali*, 753 F.2d at 1333 n. 13.

We have never directly addressed the issue of whether this modified analysis for forum non conveniens issues in the Jones

available to hear the case because the doctrine of forum non conveniens presupposes the existence of at least two forums in which all defendants are amenable to process. *Id.* at 254 n. 22, 102 S.Ct. at 265 n. 22; *see also Syn-*

Act and maritime areas is consistent with *Reyno*. We have noted that it may not be. *See De Oliveira*, 707 F.2d at 845 (applying modified analysis and citing *Reyno* with *But see* signal); *see also Koke*, 730 F.2d at 218 (same). The circuits are also split as to whether a modified analysis for Jones Act and maritime cases is appropriate. *Compare Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (Jones Act cases treated like all other cases on forum non conveniens issues) *with Villar v. Crowley Maritime Co.*, 782 F.2d 1478, 1479 (9th Cir. 1986) (adopting modified analysis announced by Fifth Circuit) *and Sigalis v. Lido Maritime Co.-M/V ROYAL ODYSSEY*, 776 F.2d 1512 (10th Cir. 1983) (same). None of these cases however have specifically addressed the effects of *Reyno*.

We have found one case that squarely confronts the issue of whether a modified analysis in the context of a Jones Act action is appropriate in the post-*Reyno* era. In *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D.Cal. 1985), the court recognized our approach but decided that it was inconsistent with *Reyno*'s command that federal courts should avoid exercises in choice-of-law or comparative law when addressing forum non conveniens issues. 615 F.Supp. at 1034-35. The court in *Sherrill* also noted that the *Reyno* decision carved out no exception for Jones Act or maritime cases from its broad pronouncement that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." *Id.* at 1035 (citing *Reyno*, 454 U.S. at 247, 102 S.Ct. at 261).

We also can discern no overriding justification for refusing to apply *Reyno*'s principles and this opinion's procedural rules to forum non conveniens issues in Jones Act and general maritime cases. We believe that a single and uniform approach to the analysis and application of the forum non conveniens doctrine best serves litigants and the courts. We, therefore, expressly disapprove of and overrule our Jones Act and general maritime caselaw that utilizes a modified forum non conveniens analysis. Henceforth, all cases, including Jones Act and maritime actions, are governed by the dictates of *Reyno* and this opinion.***

*** Judges Garza, Johnson, Garwood, and Higginbotham do not join in this footnote.

dicate 420 At Lloyd's London v. Early American Insurance Co., 796 F.2d 821, 828 (5th Cir. 1986); *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 357 (6th Cir. 1985); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980). *See generally* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3828 (2d ed. 1986) (dismissal predicated on forum non conveniens requires that all parties be amenable in alternative forum). The *Reyno* court also stated that a foreign plaintiff's selection of an American forum deserves less deference than an American citizen's selection of his home forum.[26] *Reyno*, 454 U.S. at 255-56, 102 S.Ct. at 265-66. Finally, the Court held that the possibility of an unfavorable change in the law to be applied should not be conclusive or even a substantial factor in a court's decision to dismiss for forum non conveniens.[27] *Id.* at 254-55, 102 S.Ct. at 265.

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[26] The Court's language that a foreign plaintiff's forum selection deserves less deference is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for forum non conveniens is the exception rather than the rule. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3828, at 291-92 (2d ed. 1986). The fact that plaintiffs are foreign is not, in and of itself, sufficient to require dismissal under forum non conveniens. *See Tokyo Marine & Fire Ins. Co. v. Bell Helicopter Textron*, 17 Avi. Cas. (CCH) 17,321, 17,322 (S.D.Tex. 1982); *see also Fitzpatrick, "Reyno": Its Progeny And Its Effect On Aviation Litigation*, 48 J. Air L. & Com. 539, 557 (1983).

The Court also cautioned that an American "citizen's forum choice should not be given dispositive weight" and that "dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Reyno*, 454 U.S. at 257 n. 23, 102 S.Ct. at 266 n. 23. *See also Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1162-63 n. 1 (5th Cir. 1987).

[27] An unfavorable change in the law which results in the remedy provided by the alternative forum being so clearly inadequate or unsatisfactory such that it is no remedy at all can be given sub-

A defendant of course bears the burden of invoking the doctrine and moving to dismiss in favor of a foreign forum. *Syndicate 420*, 796 F.2d at 827-29; *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983). This burden of persuasion runs to all the elements of the forum non conveniens analysis. Therefore, the moving defendant must establish that an adequate and available forum exists as to all defendants if there are several. If the moving defendant carries this initial burden, it must also establish that the private and public interests weigh heavily on the side of trial in the foreign forum. The Supreme Court has held that a moving defendant need not submit overly detailed affidavits to carry its burden, but it "must provide enough information to enable the district court to balance the parties interests." [28] *Reyno*, 454 U.S. at 258, 102 S.Ct. at 267.

Finally, the moving defendant must submit its motion in a timely manner. There is little case law on this requirement, but some courts have suggested that there are no time limits or standards for motions to dismiss for forum non conveniens. *E.g.*, *Fifth & Walnut, Inc. v. Loew's, Inc.*, 76 F.Supp. 64, 67 (D.C.N.Y.1948). We believe, however, that the better rule would be that a defendant must

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stantial weight by a court. *Id.* at 254-55, 102 S.Ct. at 265. Such a change may allow a court to conclude that a dismissal would not be in the interest of justice. *Id.* at 254 n. 22, 102 S.Ct. at 265 n. 22.

[28] The Supreme Court has not explained how much detail by a moving defendant is required. We believe the necessary detail will depend upon the particular facts of each case. Each case will present factual situations which might suggest that the parties have greater or lesser knowledge about the facts of the dispute. The issues that are contested will also affect the amount of detail required of a moving defendant. As one court has stated, however, "a motion to dismiss for forum non conveniens does not call for a detailed development of the entire case." *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 n. 3 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 781 (1976).

assert a motion to dismiss for forum non conveniens within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant. *See* Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 3828, at 291 (2d ed. 1986); *cf. Creamer v. Creamer*, 482 A.2d 346, 352 (D.C.App. 1984) (delay in making motion cuts in favor of denial). While untimeliness will not effect a waiver, it should weigh heavily against the granting of the motion because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconvenience the doctrine is meant to relieve.

B.

We now set out the controlling procedure by which a district court should apply the above principles of forum non conveniens. While we recognize that the decision to grant or deny a motion to dismiss for forum non conveniens is within the discretion of the district court, *see Reyno*, 454 U.S. at 257, 102 S.Ct. at 266, it should be an exercise in structured discretion founded on a procedural framework guiding the district court's decisionmaking process. *Friends For All Children v. Lockheed Aircraft Corp.*, 717 F.2d 602, 607 (D.C.Cir.1983).

The district court must first decide whether an available and adequate foreign forum exists. This is a two-part inquiry: availability and adequacy. A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. *See Syndicate 420*, 796 F.2d at 830; *Pain*, 637 F.2d at 784; *Calavo Growers of California v. Belgium*, 632 F.2d 963, 968 (2d Cir. 1980). A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, *Reyno*, 454 U.S. at 255, 102 S.Ct. at 265, even though they may not enjoy the same benefits as they might receive in an American court. *Syndicate 420*, 796 F.2d at 829.

If the court concludes that the foreign forum is both available and adequate, it should then consider all of the relevant factors of private interest, weighing in the balance the relevant deference given the particular plaintiff's initial choice of forum.[29] While reviewing the private interest factors, the court should also consider whether the defendant's motion to dismiss was filed in a timely manner.[30]

If the district court finds that the private interests do not weigh in favor of the dismissal, it must then consider the public interest factors. We agree with the District of Columbia Circuit when it stated that "even when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant forum non conveniens dismissal upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute or that foreign law will predominate if jurisdiction is retained." *Pain*, 637 F.2d at 792.

If the district court decides that the above considerations favor trial in a foreign forum, it must finally ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that the plaintiff may return to the American forum.

The status of the case when a forum non conveniens motion is decided is most significant in the resolution of the motion. We hold that a district court performing the above analysis, should review the motion in light of the

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[29] *See* note 26 *supra* and accompanying text.

[30] We believe the timeliness of the motion is one of the private "practical problems" to be considered under the *Gulf Oil* and *Reyno* principles.

status of the case at the time the motion is filed.[31] We believe the time the motion is filed is the appropriate time frame for considering its validity rather than the time of the action's commencement. There are many factors that might bear on the granting or denial of the motion, e.g., discovery, stipulations, admissions, the joinder or dismissal of parties, which frequently develop or occur after the action commences. Thus, the relevant circumstances at the time the motion is filed should serve as the factual backdrop of the court's decision.

Finally, a district court should set out its findings and conclusions supporting the granting or denying of a motion to dismiss for forum non conveniens. The district court's findings and conclusions should be set out in writing or clearly stated on the record. The analytical framework outlined above can serve as an appropriate structure for such findings and conclusions. Such a practice will enhance our ability to effectively review the decision by focusing the parties and the court on the particular factor(s) upon which relief was granted or denied.[32]

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[31] *Cf. Schertenleib v. Traum*,-589 F.2d 1156, 1161-64 (2d Cir. 1978) (proper time to test availability of the alternate forum is the time the motion is filed).

[32] The district court should explain its decision-making process clearly and in sufficient detail to permit us adequately to review it, either by giving written reasons or by dictating the reasons for its decision into the record with the safe degree of explicitness. We emphasize that both the parties and the district court should endeavor to ensure that specific findings and conclusions are made either in writing or orally on the record.

If we are not supplied with either a written or oral explanation of the court's decision we will not be reluctant to vacate the lower court's judgment and remand because we do not perform a de novo resolution of forum non conveniens issues. *E.g. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983) (court vacated and remanded for specification of reasons and development of facts to support decision to dismiss for forum non conveniens).

C.

The standard of appellate review for a denial of a motion to dismiss for forum non conveniens is narrow. As the Supreme Court stated:

> [The denial of a motion to dismiss for forum non conveniens] may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Reyno, 454 U.S. at 257, 102 S.Ct. at 266; *see also Syndicate 420*, 796 F.2d at 828. As with all decisions that are reviewed for abuses of discretion, it is difficult to formulate a list of examples which will be always abuses of discretion. *See generally* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982). We can say with certainty that a district court abuses its discretion when it summarily denies or grants a motion to dismiss without either written or oral explanation. We can also state that a district court abuses its discretion when it fails to address and balance the relevant principles and factors of the doctrine of forum non conveniens. *See Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1334 (9th Cir. 1984) (court's failure to consider private factors and two public factors in deciding forum non conveniens motion was abuse of discretion), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985); *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983) (district court's dismissal of plaintiff's action without balancing private and public factors or specifying facts supporting dismissal was abuse of discretion); *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 436 (D.C. Cir.1976) (district court's weighing of only disadvantages of one forum was abuse of discretion). Beyond these two examples, we cannot list which decisions will

be adjudged abuses of discretion and which will not. Simply stated, our duty as an appellate court in reviewing forum non conveniens decisions is to review the lower court's decisionmaking process and conclusion and determine if it is reasonable; our duty is not to perform a de novo analysis and make the initial determination for the district court. *See Reyno*, 454 U.S. at 257-58, 102 S.Ct. at 266-67.

In deciding whether a district court's denial of a motion to dismiss for forum non conveniens was an abuse of discretion, we may also need to consider an additional factor—the effect, if any, of a subsequent trial of the case. The denial of a motion to dismiss for forum non conveniens is not a final order under 28 U.S.C. § 1291 and, therefore, is not immediately appealable. *Partrederiet Treasure Saga, et al. v. Joy Manufacturing Co.*, 804 F.2d 308, 309-10 (5th Cir. 1986).[33] An unsuccessful defendant may seek certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or if this is denied, the defendant can petition this court for a writ of mandamus. *See In re McClelland Engineers, Inc.*, 742 F.2d 837, 839 (5th Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985). The decision to certify an interlocutory appeal pursuant to section 1292(b) is within the discretion of the trial court and unappealable. *In re McClelland*, 742 F.2d at 839. Our intervention in this decision by way of a writ of mandamus is very rare. *See Castanho v. Jackson Marine, Inc.*, 650 F.2d 546, 550 (5th Cir. 1981). Hence, initial appellate review of a denial of a motion to dismiss for forum non conveniens may sometimes follow a trial on

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[33] *See also Rosenstein v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 352, 354 (6th Cir. 1985); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 315 (1983); *Nalls v. Rolls-Royce Ltd.*, 702 F.2d 255, 255 (D.C.Cir.), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).

the merits.[34] In the present cases the district court refused to certify an interlocutory appeal of the forum non conveniens issue and we refused to issue a writ of mandamus. Pan American, therefore, had to go to trial in the forum selected by the plaintiffs without review of the district court's ruling, as may many defendants whose motions to dismiss for forum non conveniens fail.

The fact that a trial on the merits has occurred in the plaintiff's selected forum does have some effect on our decision of whether the district court abused its discretion in maintaining the action before it.[35] Unless

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[34] Through our observations that initial appellate review of a forum non conveniens decision may often follow a trial on the merits, we do not suggest that district courts and parties should not use the certification procedure of section 1292(b), nor do we suggest that we will be reluctant to accept such certifications. Certification is a proper method to obtain pre-trial appellate review of a forum non conveniens decision. We, of course, will remain receptive to receiving certifications when they are forwarded from the district courts. However, since the decision to certify is within the discretion of a district court, we cannot direct that all forum non conveniens issues be certified. That is a matter dependent upon the particular circumstances of each case and the district court's judgment.

[35] The fact that a trial has occurred should be considered only on appellate review. A district could should not consider the fact of a subsequent trial because it should not be addressing a motion to dismiss for forum non conveniens post-trial. The district court has a duty to rule on a motion to dismiss for forum non conveniens before trial for two reasons. First, the district court's decision should be based upon the factual setting at the time the motion is filed which will logically be pretrial. Second, the practice of carrying a motion to dismiss for forum non conveniens through trial frustrates the doctrine's overall purpose of avoiding unnecessary costs and inconvenience.

Nothing in the requirement that a district court rule on a motion to dismiss for forum non conveniens at the time it is filed precludes the court from re-examining its decision in light of facts that develop after the forum non conveniens motion has been resolved. If the defendant properly requests the district court to reconsider

the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, we believe the trial's occurrence and completion bolsters the district court's original decision to deny the motion to dismiss. A defendant might establish prejudice by showing key evidence or witnesses were unavailable during trial or that it did not receive a fair trial because of the forum's animosity or prejudice toward it. By pointing out such prejudice, the defendant raises an inference that the trial court's decision to deny the motion was erroneous. In any event the fact that trial on the merits has occurred, following a denial of a motion to dismiss for forum non conveniens, may be a factor to be considered on appeal in deciding whether the trial court abused its discretion. It may often times, however, not come into play if the private and public factors otherwise support the lower court's decision.

IV.

Applying the above principles and standards to the instant cases, we do not find that the district court abused its discretion in denying Pan American's motion to dismiss for forum non conveniens.

These cases do not turn upon a complicated examination of the private and public interest factors that influence a forum non conveniens decision. Rather this case was properly tried in the United States because no other forum could entertain the plaintiffs' actions against all of the defendants. An examination of the record reveals that the district court denied Pan American's

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its forum non conveniens ruling, the court may review its prior action. However, in any reconsideration the defendant bears the heavy burden of establishing great prejudice to his case or a denial of a fair trial in light of changed circumstances. If the defendant carries this burden, the district court may then alter its original ruling.

motion because the United States was to be a defendant in the plaintiffs' actions. Based upon this finding the district court concluded that Pan American had failed to carry its burden of demonstrating that an alternative foreign forum was available to plaintiffs. We agree with the district court's conclusion that no alternative forum was available.

At the time Pan American made known its intention to seek dismissal based upon forum non conveniens and at the time it filed its motion, the extant parties knew the United States was to be made a party defendant upon completion of the FTCA administrative proceedings. Furthermore, at that time every party including Pan American, proceeded under the assumption that the United States was a party to these lawsuits. The December 16 stipulation contained in Appendix A to this opinion was executed by the plaintiffs, Pan American, and the United States.[36] In papers filed in the district court Pan American stated that "The United States, and it alone, was contemplated by all as an additional party." At the times the district court ruled on the motion to dismiss, both orally and in writing, we believe it was proper for the court to consider the ultimate presence of the United States as a party in evaluating whether an alternative forum was available to plaintiffs.

On appeal Pan American insists that its assurance, contained in the motion to dismiss, to pay any judgment rendered in an alternative forum and its consent to submit to the alternative forum's jurisdiction and its underwriter's commitment to guarantee the payment of any judgment made an alternative forum available. We disagree.

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[36] While the December 16 stipulation was entered after the district court's ruling on Pan American's motion to dismiss, we believe it important to note that Pan American and the United States had prior to the motion informed the court of their intention to enter into the stipulation.

Pan American and its underwriters guaranteed to pay "any judgment rendered against *it*." (emphasis added). The "it" referred to is Pan American and not another defendant such as the United States. Plaintiffs sought recovery from Pan American and the United States, not one or the other. Plaintiffs in fact recovered a judgment against both Pan American and the United States. Furthermore, Pan American's stipulation to submit to the jurisdiction of a foreign forum cannot act as a stipulation by the United States to consent to the jurisdiction of a foreign forum.[37] Pan American's assurances of payment and jurisdiction were not joined in by the United States nor does the record indicate that they should be attributed to the United States. Pan American's conditional promises simply fail to make all defendants available to plaintiffs in a Uruguayan forum. That is the initial burden Pan American bore in seeking a dismissal for forum non conveniens, and it failed to carry it.

Since the district court correctly concluded that an alternative forum was unavailable, there was no need for it to proceed to a balancing of the private and public interest factors. Pan American's argument that the trial court's failure to perform this balancing was an abuse of discretion is without merit.

Accordingly, we affirm the district court's denial of Pan American's motion to dismiss for forum non conveniens.

V.

Our granting of the petition for rehearing en banc vacates the panel's opinion and judgment. Fifth Cir. Loc.

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[37] For a case in which the United States did join in a motion to dismiss and agreed to consent to the jurisdiction of a foreign forum, see *Friends For All Children v. Lockheed Aircraft Co.*, 717 F.2d 602 (D.C.Cir. 1983). The government's stipulation, however, did not persuade the District of Columbia Circuit to reverse a denial of the motion to dismiss. *Id.* at 610.

R. 35. Having resolved the forum non conveniens issue raised by Pan Am in its request for rehearing en banc and finding no other issue in the case worthy of en banc discussion,[38] we reinstate the following holdings of the panel:

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[38] Judge Gee vigorously objects to our decision to reinstate the panel's choice of law analysis. He also objects to the amount of damages each foreign plaintiff has recovered. In brief response to his able writing, it is first noted that the conflicts issue is a matter of state not federal law and that matters of state law are rarely worthy of en banc review. En banc review is reserved for only the most important federal law issues and is prompted by the need for a definitive statement on the law by the full court. Nothing in the conflicts issue involves a question of exceptional importance or would result in a decision that would secure uniformity in future decisions. This case merely involved application of established rules to the particular facts of these cases. Thus, as stated above, we are not persuaded that this state law issue is worthy of en banc dissertation.

Second, even setting aside this prudential reason for not reaching the issue, we are not convinced that the panel's treatment of the conflicts issue is incorrect. The issue raised by Pan American was whether the district court erred in applying Uruguayan law to allow Pampin the right to recover for the death of his aunt; this is a recovery not allowed under Louisiana law. The answer to this decision is made pursuant to Louisiana choice-of-law principles. *See Klaxon Co. v. Stentor Electrical Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) (state choice-of-law rules applied in diversity cases).

Louisiana has adopted an "interest analysis/most significant relationship" approach to choice-of-law decisions. *See Jagers v. Royal Indemnity Co.*, 276 So.2d 309 (La. 1973). Interest analysis is a two-step process. First, the court must determine whether a true or false conflict of interests exists. This determination is made by examining the various competing interests of the states involved with a particular issue. If a false conflict exists, the law of the state with the exclusive interest is applied and the second step is unnecessary. If a true conflict exists, the law of the state with the most significant relationship to a particular issue is applied in accordance with the principles of the Second Restatement of Conflicts of Laws. *See Brown v. DSI Transports, Inc.*, 496 So.2d 478, 481 (La.App. 1986); *Burns v. Holiday Travels, Inc.*, 459 So.2d 666,

668 (La.App. 1984); *Lee v. Ford Motor Co.*, 457 So.2d 193, 194 (La.App. 2d Cir. 1984). This two-step process must be performed for each significant issue in the case. *See Silver v. Nelson*, 610 F.Supp. 505, 513 (E.D.La. 1985) (applying Louisiana law). The process of analyzing separate issues within a single case for choice-of-law decisions and applying different laws to different parts of the same case is known as depacage, and Louisiana law has adopted this choice-of-law theory. *See generally* Reese, *Depacage: A Common Phenomenon in Choice of Law*, 73 Colum.L.Rev. 58 (1973).

If a true conflict exists reference would be made to provisions of the Restatement. On the issue of the right to a cause of action for death, section 175 of the Restatement provides:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Section 6 of the Restatement provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no directive, the factors relevant to the choice of the applicable rule of law include:
>
> (a) the needs of the interstate and international systems;
>
> (b) the relevant policies of the forum;
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
>
> (d) the protection of justified expectations;
>
> (e) the basic policies underlying the particular field of law;
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

The first question is whether there is a true conflict of laws on the issue of whether Pampin can recover for the death of his aunt. The laws of the two involved forums are certainly in conflict—Uruguay allows recovery, Louisiana does not—but this observation does not by itself answer whether a true conflict exists. We must also look to the interests of the two states involved. Uruguay's interest in seeing that its law applies is apparent—to ensure that an Uruguayan heir or relative of a Uruguayan citizen wrongfully killed may gain compensation for that wrongful death. Louisiana's

interest in seeing its law aplied so as to prevent Pampin's recovery is somewhat elusive but it could be argued that Louisiana has an interest in protecting, through limiting the possibility of recovery for wrongful death to a smaller list of relatives, non-resident entrepreneurs, such as Pan American who do business in Louisiana. Assuming that this Louisiana interest does exist, then a true conflict of interests exists on this legal issue and we would turn to the Restatement for guidance.

Considering section 175 and the provisions of section 6, Uruguayan law was properly applied by the district court and affirmed by the panel. While section 175 would give Louisiana the initial nod because it is the situs of the injury, Uruguay's interest in seeing that relatives of a deceased Uruguayan citizen recover damages for those wrongful deaths overrides the speculative interest of Louisiana in protecting non-resident tortfeasors. This decision is also consistent with the concerns expressed in section 6(2), (b), (c), and (d) of the Restatement.

Any decision here also has to be influenced by the district court's determination that Uruguayan law properly governed the issue of whether Pampin could recover damages for the death of his aunt. "The well-settled rule in this Circuit is that on review we accord significant weight to a federal district court's determination of the law of the state in which it sits." *Browning Seed, Inc. v. Bayles*, 812 F.2d 999, 1004 (5th Cir. 1987); *Armstrong v. Farm Equipment*, 742 F.2d 883, 886 (5th Cir. 1984).

The dissent's primary complaint is that the result in this case involves application of a law that no sovereign would apply and that the Uruguayan citizens seeking recompense for the wrongful deaths of their relatives are able to recover more here in the United States than they could in Uruguay. On the first point, the very application of the depacage theory often results in an amalgamation of laws depending upon the relative interests of the particular forum to a particular issue. Since Louisiana has adopted this theory we are not free to ignore in favor of a result we might otherwise think appropriate.

As to the second point, it would seem the dissent wishes to take away with the left hand what it gives with the right. The dissent agrees that the plaintiffs in this case are entitled to litigate their claims in the United States. But the dissent asserts that any recovery they might recover must "approximate" the recovery they could have obtained in a Uruguayan court from a Uruguayan jury. Thus while we say "Yes plaintiff you have shown you are entitled to have your claim heard in the United States," we would add parenthetically "But you can not recover the same amount as a native litigant can." Admittedly the United States forum is a

(1) The district court correctly applied Uruguayan law in recognizing and allowing Pampin's claim for death of his aunt; ****

(2) The district court correctly denied Pan American's invocation of the Warsaw Convention liability-damages limitation;

(3) The plaintiffs-appellees' awards for pre-impact damages is affirmed but remitted to $7,500 for each decedent and if plaintiffs-appellees do not accept such remittitur then a new trial on these damages is ordered;

(4) The award to Pampin for the post-impact pain and suffering of his aunt is affirmed without alteration;

(5) The award to Pampin of $250,000 for the loss of his mother is affirmed without alteration;

(6) The award to Pampin for the loss of his sister is affirmed but remitted to $50,000, and if Pam-

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generous arena, that of course is one reason why it is a popular forum for litigants. But entitlement to be heard in a United States forum is not automatic, as we have discussed earlier. Hence, since these plaintiffs have demonstrated that their cases are properly within a federal forum we can discern no reason to deprive them of the full benefits of that forum. The dissent argues that this is somehow unfair to Pan American. Nothing, however, appears unfair in requiring Pan American to compensate these Uruguayan citizens for the death of their relatives by American jury standards when Pan American was admittedly responsible for their deaths in the United States and when Pan American charged the same price for airfare in the United States to the deceased Uruguayan passengers as it did to domestic passengers. Both facts indicate that Pan American could reasonably anticipate being held accountable to American standards for the deaths of these foreign citizens.

**** Chief Judge Clark and Judges Garza, Gee, Garwood, Jolly, Davis, and Jones do not join in the opinion's reinstatement of the panel's choice-of-law decision.

pin does not accept this remittitur then a new trial on these damages is ordered;

(7) The awards to the Trivelloni-Lopez children for the loss of their parents is affirmed without alteration;

(8) The district court correctly refused to discount the damages for loss of love and affection to present value;

(9) The district court correctly awarded pre-judgment interest against Pan American; and

(10) Interest can be awarded against the United States only from the date of judgment, therefore, the portion of the judgment awarding pre-judgment interest against the United States is reversed and it is directed that a correct judgment be entered on remand.

For the reason stated above, we AFFIRM the district court's denial of Pan American's motion to dismiss for forum non conveniens. As to the other issues raised in this appeal, we AFFIRM in part, REVERSE in part, REMIT in part or alternatively order a new trial on particular damages, and REMAND to the district court for entry of a judgment consistent herewith.

APPENDIX A

It is hereby stipulated and agreed by and between the plaintiff(s) herein and Pan American World Airways, Inc. and the United States of America, defendants herein, by and through their respective attorneys as follows:

1) The plaintiff(s) in this action purport to be the proper plaintiff(s), personal representative and/or next of kin who have commenced an action against Pan American World Airways, Inc., the Boeing Company, the United States of America, United States Aviation Underwriters, Inc. and/or the New Orleans Aviation Board (hereinafter referred to as "the defendants") alleging damages as a result of the death of, or injury to, Electra Lorenzi de Trivelloni and Luis Trivelloni and other damages allegedly sustained as a result of this accident.

2) There are numerous contested issues arising out of this litigation that may result in uncertainty and extensive proceedings and the parties are desirous of saving the time and expense of all parties and of the Court.

3) Defendants Pan American and the United States shall not contest their liability for compensatory damages in this case and plaintiff(s) shall not be required to establish their liability for such compensatory damages. The Court may enter judgment for plaintiff(s) for compensatory damages after trial, in an amount determined by the jury or Court, whichever is applicable.

4) In consideration for the agreement by defendants Pan American and the United States not to contest the issue of their liability for compensatory damages in this action, plaintiff(s) agree (1) to waive all other claims for damages, including any claim for punitive or exemplary damages, (2) to dismiss any such causes of action in the Complaint herein, and (3) to dismiss all defendants, other than Pan American and the United States, from this action with prejudice and without costs.

5) The Warsaw Convention/Montreal Agreement limitations on recoverable compensatory damages shall be preserved as a defense herein by Pan American as against

any plaintiff(s) where applicable. All other defenses, except the defense of no liability for compensatory damages, are reserved by Pan American and the United States.

6) In the event plaintiff and defendants Pan American and the United States are unable to agree on the law applicable to the issue of compensatory damages, the issue shall be decided by the transferee court so that if this case is remanded to the transferor court for trial the only issue to be tried will be the quantum of compensatory damages pursuant to the applicable law, as determined by the transferee court.

7) The right to appeal from a compensatory damage judgment (except as to liability therefor) is reserved to plaintiff and defendants Pan American and the United States.

8) Defendants Pan American and the United States shall not contest their liability for provable property loss of damage claims made by plaintiff(s) herein but reserve the right to assert any applicable tariff and contractual exclusions and limitations to liability with respect thereto.

9) In the event the parties hereto are unable to negotiate a settlement of the compensatory damage claims, they shall except by agreement of the parties or a Court order to the contrary agree to a non-binding settlement conference before that individual, or individuals, designated by this Court before the issue of compensatory damages is the subject of trial.

10) As a condition precedent to the payment of the compensatory damages referred to above, plaintiff(s) and their attorneys hereby agree to deliver a general release, in a form satisfactory to the defendants, fully discharging the defendants named herein, their insurers and any other entities who are or may be claimed to be responsible in whole or in part for this accident from all liability of any nature to plaintiff(s).

11) The approval of this stipulation by the attorneys for each of the defendants herein is in no way to be con-

strued as an admission of responsibility or liability by any individual, corporation or governmental entity for the damages alleged in the Complaint filed in this action, said responsibility and liability being expressly denied by each of said defendants; but this stipulation is solely and unconditionally intended to accomplish the fair and expeditious compensation of plaintiff(s) insofar as they are proper parties to this action, without reference to fault or responsibility, and nothing contained herein should be construed to the contrary.

12) This stipulation is limited to the parties in this action only and shall not affect the rights of defendants in other litigation arising out of this accident, now pending or hereafter brought.

13) United States Aviation Underwriters, Inc. for and on behalf of the United States Aircraft Insurance Group and all of the other liability insurers of Pan American World Airways, Inc. as of July 9, 1982 hereby guarantee the payment of any judgment rendered against Pan American World Airways, Inc. pursuant to this stipulation in accordance with the applicable aircraft liability insurance policy in effect on July 9, 1982.

/s/ Stephen B. Murray

Stephen B. Murray, Esq.
Attorney for Plaintiff(s)

/s/ Francis G. Weller

Francis G. Weller, Esq.
Attorney for Defendant
Pan American Airways, Inc.

/s/ James P. Piper

James P. Piper
Attorney for Defendant
The United States of America

GEE, Circuit Judge, with whom CLARK, Chief Judge, GARWOOD, JOLLY, DAVIS and JONES, Circuit Judges, join, concurring in part and dissenting in part:

I begin this concurrence and dissent by voicing my whole-hearted concurrence in the majority's analysis and application of the *forum non conveniens* doctrine. The majority provides an excellent exposition of the doctrine and a helpful step-by-step guide to its application. I must dissent, however, on the choice of law issue.

I.

The majority reinstates the panel's holding, concluding: "The district court correctly applied Uruguayan law in recognizing and allowing Pampin's claim for the death of his aunt." For prudential reasons,[1] the majority declines to address the choice of law issue directly, but it does address the merits of the issue in its footnote 38, because it is "not convinced that the panel's treatment of the issue was incorrect." I am convinced on the other hand, that the panel's and the majority's analyses provide a deceptively simple solution to a difficult issue.

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[1] The majority relies on prudential reasons for declining to reach this issue: the case merely involves "application of established rules to the particular facts" and matters of state law are "rarely worthy of en banc review." For me, this case is an exception to those rules. Our task is to apply the Louisiana law faithfully and correctly. I find no Louisiana cases that directly address this fact pattern, a damages-only controversy brought by foreign plaintiffs. I also find nothing in the state law that indicates a Louisiana court would apply the "established rules" as the majority has. Rather, my reading of the sources upon which Louisiana law relies, the general principles governing interest analysis and the Restatement (Second) on Conflict of Laws, indicates that the majority's analysis fails to recognize the full gamut of principles that guide interest analysis. Understandably so. Interest analysis is relatively young. The decisional base, from which emerge patterns applying interest analysis, has only begun to address the wealth of varying fact situations that present conflict issues. It is not surprising that since the adoption of interest analysis with the *Jagers* decision in

Initially, I paused at a choice of law analysis that not only allows Mr. Pampin, a citizen of Uruguay, to recover Louisiana-scale compensation under Louisiana law for the wrongful death of his relatives, but also allows him to recover damages under Uruguayan law for the wrongful death of his aunt, a right not recognized under Louisiana law. It seemed that something had gone awry with an analysis that applied an amalgam of laws which no sovereign would apply to its own citizens. Having embarked on what I had envisioned as a brief dissent on this point, and having read somewhat in the disputed area, I now find myself fundamentally at odds with the analysis employed by the panel (and approved by the ma-

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1972 the Louisiana courts have not been called upon to apply the doctrine to the situation presented here. As a federal court, we can reasonably expect to see this issue again. In aircrash disasters, as a rule, the defendant airline concedes liability. (Pan American notes that the last reported mass aircrash disaster case in which liability was contested was nine years ago. *In re Air Crash at John F. Kennedy International Airport*, 479 F.Supp 1118, 1120-21 (E.D. N.Y. 1978). Thus, our court is prone to addressing a damages-only conflict issue in diversity cases brought by plaintiffs foreign to the forum, expecially in controversies arising from mass disasters.

Although the court did not take this case en banc to address the choice of law decision, we are squarely presented with an opportunity to correct what I perceive as a faulty analysis by *our* court. The majority would prefer to finesse the issue. In effect this will saddle an unfortunate panel in the future with the difficult task of sorting through the issue, guided in all probability by no definitive statement from the Louisiana courts and a patchwork of ambiguous and contradictory thoughts in this en banc decision. The rule in this Circuit is that only through the en banc process will a panel opinion be overruled. Thus, even if a majority of the Court should ultimately disagree with the view adopted in a panel opinion, the "prudential reason" for declining to decide this issue—that this is a state law question—will still remain. Unless and until the Louisiana courts reach this precise issue, which they have not in the past fourteen years, we are in danger of confirming the aphorism that "Some courts live by correcting the errors of others and adhering to their own." *Ellison v. Georgia R.R.*, 87 Ga. 691, 695-96, 13 S.E. 809, 810 (1891).

jority) that results in the application of Louisiana's rules governing compensation in the first place.

A.

We are bound in this diversity case to apply Louisiana's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed 1477 (1941); *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Louisiana has adopted an approach for resolving choice of law issues that incorporates both interest analysis and the principles embodied in the Restatement (Second) of Conflict of Laws (1969). *Jagers v. Royal Indemnity Co.*, 276 So.2d 309 (La.1973). Section 6 of the Restatement states the general principles that guide choice-of-law determinations: [2]

a. the needs of the interstate and international systems;

b. the relevant policies of the forum;

c. the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue;

d. the protection of justified expectations;

e. the basic policies underlying the particular field of law;

f. certainty, predictability and uniformity of result; and

g. ease in determination and application of the law to be applied.

The Restatement further explains that the "forum should seek to reach a result that will achieve the best

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[2] These principles apply when the choice of law is not specifically governed by state statute. *See e.g., Shaw v. Ferguson*, 437 So.2d 319 (La.App.2d Cir. 1983).

possible accommodation" of the relevant policies of all other interested states, adding that "it is fitting that the state whose interests are most deeply affected should have its local law applied." Restatement (Second) of Conflict of Laws § 6 comment f (1969).

The first step in interest analysis is to determine whether a "true" or "false" conflict exists. "A false conflict occurs when, after examining the content and objectives of the laws of states A and B relating to the specific issues, it is found that only state A has an interest in the application of its law and that state B has no interest." *Jagers*, 276 So.2d at 312 n.2 (citation omitted). If a false conflict is found, the analysis ends —simply apply the law of State A, the only one having an interest. The Louisiana courts resolve a true conflict, with reference to the Restatement, by applying the law of the state with the "most significant relationship" to the occurrence and the parties.[3] At this stage, one state

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[3] For example, the Restatement's general rule for torts is:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (3) the place where the injury occurred,
>
> (4) the place where the conduct causing the injury occurred,
>
> (5) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (6) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflicts of Laws § 145 (1969).

is determined to have the "lesser interest" in applying its law.[4]

The panel apparently found a false conflict. It determined that Uruguay had "no interest" in applying its law, because the recovery under Louisiana law "equals or exceeds" that available under Uruguayan law. "[I]t is beyond the pale of reason to conclude that Uruguay would have an interest in prohibiting the award, provided no Uruguayan defendant is involved. We are persuaded that the needs of the international system will be served best in this instance by application of the law of Louisiana." 789 F.2d 1092, 1097.

On the issue whether Pampin should be allowed to recover for the wrongful death of his aunt, however, the panel employed the technique of depecage—splitting the "issues" and subjecting each "issue" to a separate interest analysis to resolve which state's law should apply. The panel separately analyzed Uruguay's interest in applying that aspect of its wrongful death jurisprudence which purportedly recognizes a nephew's right to recover for the death of an aunt. The panel concluded that because Louisiana law provides no such recovery, the law of Uruguay should apply. Presumably, Uruguay's interest in affording this type of recovery for its citizen prevails. Presumably also, Louisiana has a lesser interest or no interest in extending the protections under its laws to these non-Louisiana defendants.

B.

I begin my analysis by identifying the interests of Louisiana and Uruguay, by reference to the policies of those states that are at stake here. It is clear that the

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[4] We discover, however, the two steps are interrelated: whether a state has "no interest," because no relevant state policy is implicated, depends not only on the content and objectives of its laws, but also on the relationship of these policies to the controversy and the parties—a question resolved in the second step.

state where the plaintiff is domiciled has an interest in seeing that its citizens are adequately compensated for the effects visited upon them by the tortious conduct of others. *Brown v. DSI Transports, Inc.*, 496 So.2d 478 (La.App. 1st Cir.), *writ denied*, 498 So.2d 18 (1986).[5] This implies that the domiciliary state has an interest in applying its compensation scheme, as a *minimum*, for the benefit of its residents.

The sovereign at the place of the wrong has an interest in regulating conduct within its borders. That interest, however, is not directly implicated in today's case, because both defendants have conceded liability; the conflicts issue is narrowed to determining which state's rules should apply to compensation in wrongful death cases. The interest of the place of the wrong in applying its compensation scheme for the benefit of the out-of-state plaintiff is elusive. It could be said that the place of the wrong has an interest that *some* compensation be afforded, on the theory that this promotes deterrence of tortious conduct within its borders. Difficulties with that theory aside,[6] the issue reduces to this: whether the *differential* between a lower recovery under foreign law and a higher recovery under local law would have any effect on the prospective measures the defendants

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[5] The domiciliary state's interest in insuring that its residents are adequately compensated in wrongful death actions is well-recognized. *Mahfoud v. Eastern Airlines, Inc.*, 17 Av. Cas. (CCH) ¶ 17, 714, 17, 715 (W.D. La. 1982), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984), 474 U.S. 213, 106 S.Ct. 586, 88 L.Ed.2d 522 (1985); *Guillory v. United States*, 699 F.2d 781, 786-89 (5th Cir. 1983); *Gordon v. Eastern Airlines, Inc.*, 391 F. Supp. 31, 33-34 (S.D.N.Y. 1975); *In re Air Crash Disaster Near Chicago, Ill.*, 480 F. Supp. 1280, 1283 (N.D.Ill. 1979), *aff'd*, 644 F.2d 633 (7th Cir. 1981) (the domicile state has an interest in the administration of the decedent's estate and with the provision of adequate compensation to the decedent's surviving relatives.)

[6] This is premised on the assumption that one can logically speak of the deterrence of unintentional tortious behavior.

take to prevent this type of accident. I am unwilling to conclude that this effect would be appreciable.

If recovery under Louisiana law exceeds that under Uruguyan law, the situation does not present a false conflict, but an "unprovided-for" case.[7] The law of the plaintiff's state favors the defendant and the law of the defendant's state favors the plaintiff. A vacuum is created because *neither* state is said to have an "interest" in applying its law relative to the other.[8] It is patent both that Uruguay has no interest in protecting this out-of-state defendant and that Louisiana has no interest in providing higher compensation than the foreign plaintiff would receive in his home state forum.

The flaw in the panel's analysis is in its unexamined assumption that, having found that Uruguay had "no interest" in prohibiting the potentially higher recovery under Louisiana law, that Louisiana law *should* be applied. There is no reason for that assumption. Instead, we must begin anew to ascertain which state's law should

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[7] B. Currie, *Selected Essays on the Conflict of Laws* 152-56 (1963). The majority begins its analysis with the depecage issue and does not address this fundamental difference in our analyses: in the first stage of the analysis, this case presents neither a "true" or "false" conflict, but an "unprovided for" case, a distinction long ago recognized by our brother Rubin, then on the district bench, in Louisiana's approach to interest analysis. *Ardoyno v. Kyzar*, 426 F. Supp. 78, 83 n.14 (E.D. La. 1976) (citing Currie's definition of an "unprovided-for" case, but not reaching the issues presented in such a case).

[8] In the true-false conflict dichotomy, at least one state is "interested" in applying its laws; because such would significantly advance its policies. When the application of that interested state's law would not hinder the policies of another contact state, the law of the interested state should apply. *See e.g. Jagers*, 276 So.2d at 312 n.2 (a false conflict occurs when "it is found that *only state A has an interest* in the application of its law and that state B has no interest") (attributing this language to Brainerd Currie) (emphasis added).

fill the vacuum. The panel never took this second step. Because it should have done so, I shall.

C.

To resolve unprovided-for cases, the *Jagers* decision indicates Louisiana would look to the general choice-of-law principles in Section 6 of the Restatement. Concerning "relevant state policies," Uruguay's jurisprudence represents its views on what constitutes adequate and just compensation for its citizens in a scheme it considers fair to impose upon its own citizen tortfeasors. Only tenuous theoretical bases support Louisiana's interest, as the place of the wrong, in advancing its recovery scheme for the benefit of this plaintiff.

In the unprovided-for case, the "relative interests of the states in the determination of the issues" do not come into play: neither state has an interest in applying its law relative to the other. Concerning the needs of the international system, comity does not require more respect for Uruguay's interest in this plaintiff than that Uruguayan law be applied as a Uruguayan forum would apply it, that he receive what his own sovereign would grant him under its own law.

The place of the wrong may be said to have an altruistic interest in extending the benefits of its recovery scheme to nonresidents. *See, e.g., Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973). I detect, however, that this "interest" is grounded in a one-sided view that it is not unfair to apply to the defendant the law of the place of the wrong when it affords the plaintiff a higher recovery than does the domiciliary state's law.[9] The

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[9] In *Labree*, a Massachusetts plaintiff sued her Rhode Island driver for injuries sustained in an automobile accident occurring in Massachusetts. It was an "unprovided-for" case, because, Rhode Island, the defendant-driver's state, imposed ordinary negligence standards with respect to guests—law unfavorable to the defendant

other side of the coin must be acknowledged—it is not unfair to apply the domicile state's scheme, even though it may afford a lower recovery. To fill the vacuum reflexively in unprovided-for cases with the law that maximizes recovery *is* unfair to defendants. Unlike most economic situations, the damage suit is a classic zero-sum game and hence is subject to a simple static analysis: what the plaintiff gains, the defendant loses. Yet, today this Court in effect approves a "maximization of recovery" rule: Whatever rule produces the largest verdict is intrinsically preferable and should be chosen. I am unable to square such a general presumption that a plaintiff should always recover as much as possible with any notion of even-handed justice. Such a rule that mindlessly magnifies what one person can take from another in a legal encounter has no more essential and intrinsic merit than one which mindlessly minimizes it—assuming that our concern is justice.

I find no indication that Louisiana espouses a recovery-maximizing rule [10] or that interest analysis justifies one. Indeed, the point is not to minimize or maximize recovery, but to accommodate relevant policies of the states who are interested in the results of the litigation. The matter leaps into focus the moment the shoe is placed on the other foot: would we apply Uruguayan standards of

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—and Massachusetts applied gross negligence standards—law unfavorable to the plaintiff. The Rhode Island Supreme Court found nothing wrong with holding its own citizens to a higher standard of care than that imposed by the states to which they travel, "no matter who may be injured by their misconduct." 306 A.2d at 818.

[10] *See, e.g., Lee v. Ford Motor Co.*, 457 So.2d 193 (La. App. 2d Cir.), *writ denied*, 461 So.2d 319 (La. 1984) (applying unfavorable Louisiana law to Louisiana plaintiff); *Burns v. Holiday Travels, Inc.*, 459 So.2d 666 (La. App. 4th Cir. 1984) (applying unfavorable Florida law to Louisiana plaintiff); *Decatur v. United States Fidelity & Guar. Co.*, 464 So.2d 854 (La. App. 5th Cir. 1985) (denying benefits of Louisiana law to temporary Louisiana resident).

compensation to the relatives of Louisiana residents killed in Uruguay?[11] Interest analysis requires us to examine both Uruguay's and Louisiana's interest in the controversy and the parties. The domiciliary state's interest in applying its rules affording higher recovery is strong, but that interest does not necessarily predominate in a true conflict case, *e.g.*, when the plaintiff, whose home state law is favorable to him, acts out-of-state, and the defendant acts only in a jurisdiction whose law favors him. *See e.g., Burns v. Holiday Travels, Inc.*, 459 So.2d 666 (La.App. 4th Cir.1984).

Because in unprovided-for cases it is fair to the plaintiff to apply his home state's compensation scheme, forum *qua* forum interests convince me that the domiciliary state's rules *should* fill the vacuum. Aircrash and other mass disasters typically present both domestic and international conflicts in compensation issues. Typically also, unprovided-for cases are presented when any forum affording jurisdiction over the defendant(s) offers the potential for higher recovery than does the plaintiff's home state forum.[12] Forum *qua* forum interests indicate a need for the predictable application of the domiciliary state's recovery in cases like this one. Concededly, the courts will encounter difficulties in finding and applying foreign law when the forum state is not the state of domicile. In the long term, however,—and most clearly of all in cases (such as this) where damages alone are at issue—certainty and uniformity are enhanced when compensation

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[11] The question, when appended, sheds light on the depecage issue. Let us assume all Uruguayan compensation rules at least "equal" those of Louisiana: would we apply Uruguayan standards of compensation to the relatives of Louisiana residents killed in Uruguay, even if Uruguay, but not Louisiana, allows recovery by a nephew or niece for the death of an aunt?

[12] From this accident alone, foreign plaintiffs filed 52 actions in the United States on behalf of 42 foreign residents who died in the crash.

is predictably based on the domicile's scheme, with the fortuitous place of the accident and the availability of jurisdiction in forums with plaintiff-favoring laws are removed from the calculus. In the end, the interest in judicial efficiency is served: the predictable choice of the domicile state's law should encourage settlement and discourage forum shopping.[13]

D.

I return to the use of depecage in this case.[14] This technique is a recognized[15] and valuable tool in interest analysis, but one highly subject to producing distorted results. In splitting the issue as it did, the panel created a classic depecage problem, that of producing a result different from that obtainable under the legal system in *either* contact state, i.e. Louisiana or Uruguay. This result alone signals the need for reexamination of our choice of law or laws. The touchstone to the reevaluation is whether this result "produces a better accommodation of relevant state policies than would mirroring the intrastate result in any of the contact states and consequently

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[13] When the laws in putative conflict are perceived as affording equivalent recoveries, the forum interest in efficiency points to application of the familiar local law. The values of certainty and predictability, however, point to the application of domiciliary law if the comparison of laws shows discrepancies.

[14] If the suggested choice of the domiciliary state's compensation scheme is adopted, it is ultimately unnecessary to reach the depecage issue in cases such as this. I reach it here because it is an integral part of the majority's analysis.

[15] For example, Section 145 of the Restatement provides: The rights and liabilities of the parties with respect to *an issue* in tort are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. Restatement (Second) § 145 (1969) (emphasis added). *See also* Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58 (1973).

is neither irrational nor unfair to the losing party." R. Weintraub, *Commentary on the Conflict of Laws*, 73 (3d Ed.1986).

In splitting the issue as it did, the panel created a true conflict. The panel correctly concluded that Uruguay had an interest in applying its rule that affords a greater recovery. It failed to acknowledge, however, that Louisiana has an interest in protecting not just its own resident-defendants but also entrepreneurs doing business in its state. *Karavokiros v. Indiana Motor Bus Co.*, 524 F.Supp. 385, 387 n.1 (E.D.La. 1981) (citing B. Currie, *Selected Essays on the Conflict of Laws*, 704-05 (1963)). Sound reasons support that interest, not the least being that one who is plundered in the courts of a state will, insofar as he has a choice, minimize his contacts there. While that interest may not always prevail in a true conflict, to fail to recognize it, once again, gives effect to a maximum recovery rule: the overall effect of the panel's choice of law decisions was to impose on the defendants all the burdens of Louisiana law and yet deny them its benefits.

Several other factors cast suspicion on the need to "accommodate" Uruguay's interest by creating this amalgam of laws. It was a matter of dispute whether Uruguay would recognize Pampin's alleged right to recover either wrongful death damages or his right to maintain a survival action grounded in his decedent aunt's personal injury claims.[16] There were other nieces and

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[16] Pan Am's expert in Uruguayan law contended that Pampin would recover for neither cause of action under Uruguayan law: a nephew's recovery for moral (nonpecuniary) damages is without Uruguayan precedent; several Uruguayan decisions support the proposition that children, let alone other relatives, cannot recover for a decedent's alleged fright or pain before death.

On the wrongful death claim, Pampin was awarded $13,000 for the loss of his aunt's love and affection. On the survivor's action, the jury awarded $12,000 for postimpact pain and suffering and $25,000 for preimpact suffering. The panel remitted the latter to $7,500.

nephews whose claims the court had earlier dismissed without prejudice. If Uruguay recognizes a right to recover in any of these claimants, there is a high probability these relatives will raise these claims in a Uruguayan court.[17] Given these circumstances, the process of "accommodating" the Uruguayan interest in applying this narrow rule embedded in its compensation and succession scheme was unwarranted.[18]

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[17] The aunt had no children. If the wrongful death claims are cognizable under Uruguayan law, Pan Am remained subject to defending these cousins' claims in a Uruguayan forum. Does Uruguay have an "interest" in the survival action? You bet your family it does. If Uruguay recognizes this claim, it has an interest in distributing the proceeds according to its own succession scheme.

[18] Beyond this specific circumstance, I question the need for depecage when compensation is the only issue. The majority states that Louisiana law requires a separate interest analysis of each significant issue in the case, relying on *Silver v. Nelson*, 610 F. Supp. 505, 513 (E.D. La. 1985). This is true, but the *Silver* Court's language warrants full quotation:

> This two-part analysis must be performed separately for every significant issue in the case, for, under interest analysis, "cases can be expected to arise with some frequency where different states have the greatest concern in the determination of different issues."

Id. at 513 (citing *Ardoyno v. Kyzar*, 426 F. Supp. 78, 81 (E.D. La. 1976); quoting Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Column. L. Rev. 58, 59 (1973)).

On the question of what constitutes *different* issues, I again part ways with the reasoning inherent in the panel and majority opinions. When the conflicts question involves liability issues—which imply that the place of the wrong has an interest—and compensation issues—which imply that the domicile state has an important interest—the court's assessment of these interests, when they compete, is like comparing apples with oranges. So long as the end results are reexamined, depecage can provide a better accommodation of a state's interest by isolating relevant policy concerns underlying *different* issues. When the only issues concern damages arising from an unintentional tort, and thus the only relevant policies

II.

This case also illustrates a need to reassess our review for excessiveness of jury awards made by United States juries in foreign cases. I do not quarrel with the considerable circumspection with which an appellate court reviews jury awards. *See, e.g., In re Air Crash Disaster Near New Orleans (Giacontieri)*, 767 F.2d 1151, 1155 (5th Cir.1985). We look first to the facts in the record; then, for "rough guidance" we examine past awards for similar injuries. *Id.* at 1156. In reviewing awards made under foreign law, the rough guidance to which we look for comparative purposes should be supplied by the same culture that supplies the law. It cannot be gainsaid that the plaintiff here has obtained a bounteous—indeed, an all but ludicrous—windfall under Uruguayan standards. The record indicates that the highest comparable Uruguayan award ever made was in 1982, for a total of approximately $17,000; that case involved claims by a widow and four children for the loss of their husband and father. The jury awarded Pampin $250,000 and $150,000 for the loss of the love and affection of his mother and sister respectively. Here, by Uruguayan standards, is compassion run amok. Our courts should at least attempt to approximate the result obtainable under the plaintiff's home state law, in the plaintiff's home state forum. For reasons stated above, in cases like today's, this result would be fair to both

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are those underlying a state's compensation scheme, we do not necessarily need a section-by-section comparison of the orange.

Wrongful death claims, in particular, present a gold mine of issues that can theoretically be split into subissues for choice of law purposes, including rules governing (1) defenses available to the defendant, (2) damages, including types of compensable losses, (3) persons who may bring the action, and (4) the beneficiaries who will share in the recovery. The Restatement generally counsels that the law chosen to govern the right of action for wrongful death, under § 175, should govern these four enumerated subissues. *See* Restatement (Second) § 176-180.

plaintiffs and defendants. Moreover, it is counter to forum *qua* forum interests to provide "windfall" awards which serve as the impetus for forum shopping when it is highly likely that the optimal forum for proceedings concerned only with compensation is that of the plaintiff's home state.

My analysis of our review for excessiveness assumes that foreign law supplies the rules governing damages issues. It also illustrates that the choice of law and the appropriateness of the jury award are bound together; both are inextricably tied to the *forum non conveniens* decision, in which the court grants or denies the foreign plaintiff a United States forum, which in turn effectuates the forum's choice of law if it retains the case or nullifies that choice if it dismisses the claim. Although we separately analyze each of the three issues, they form a seamless web, which is distorted by a flawed decision in any of the three.

GARZA, Circuit Judge, concurring in part and dissenting in part:

While I concur in the majority of Judge Hill's opinion, I join in Judge Garwood's concurring opinion as to footnote 25 since I do not believe such footnote is necessary to the decision on the issue of forum non conveniens in this case.

I dissent on the issue of allowing plaintiff Pampin to recover for the death of his aunt. While I joined the decision of the panel on this issue, further reflection has caused me to change my view.

The majority seems to think that questions of state law are not worthy of *en banc* consideration. We, unlike the Supreme Court, do not take a case to pass on only one narrow issue. As the majority concedes, when our court takes a case *en banc* it vacates the panel's opinion and

judgment. We are therefore free to correct anything that the panel held and resolve any issue left hanging, even though by itself it would not have deserved *en banc* consideration.

The plaintiff Pampin and his counsel sought the jurisdiction of a federal court sitting in Louisiana in a diversity case. They knew, as the panel and the majority now hold, that Louisiana law would apply. They knew that under Louisiana law plaintiff Pampin could not have recovered for the death of his aunt. Plaintiffs such as Pampin who choose their forum should be held to recover only what that forum can give them under the law of the forum. As thoroughly covered by the majority and the dissent, by choosing Louisiana as the forum plaintiffs were able to get higher awards than they would have gotten in their native Uruguay. By the same token they should have taken the bitter with the sweet and realized that there was no cause of action in Louisiana for recovering for the death of an aunt.

My position is very short and sweet. Once a proper forum is chosen by a plaintiff he must abide by the laws of that forum for all purposes. When a plaintiff chooses the forum he knows what law is available to him in that forum. A court would not then have to indulge in deciding an "interest analysis/most significant relationship" approach to choice-of-law decisions to determine whether or not there is a true or false conflict of interest or adopt the depecage theory. If it had been a Louisiana citizen who lost an aunt in the crash under consideration, he would never be able to recover for the loss of the aunt; no matter what theories of recovery a court could think of, a Louisiana citizen-plaintiff would never ever obtain what plaintiff Pampin did.

My view would bring certainty, predictability, and uniformity of result in accordance with section 6(f) of the Restatement (Second) of Conflict of Laws and would certainly bring about consistent determination and ap-

plication of the law to be applied as per section 6(g) of the Restatement. I probably will be a lone voice crying in the wilderness, but I believe that my approach of telling a plaintiff that once he chooses a forum and it is decided that the law of that forum will control, he is choosing his forum with his eyes wide open knowing what he can and cannot recover under the law of that forum.

I therefore dissent in allowing Pampin to collect damages for the death of his aunt in a court sitting in Louisiana.

JOHNSON, Circuit Judge, concurring:

I concur in all of Judge Hill's opinion except footnote 25. I do not join in footnote 25 for the reasons stated in Judge Garwood's concurring opinion.

GARWOOD, Circuit Judge, concurring in part and dissenting in part:

I concur in all of Judge Hill's opinion except footnotes 25 and 38.

In what almost amounts to an afterthought, we employ a footnote to partially overrule more than fifteen published opinions of this Court decided within the last six years. The Jones Act issue is simply not before us in this case, and has not been raised, briefed, or argued. I am not aware of any of our Jones Act cases where the result would have been different had a more clearly *Reyno*-oriented analysis been followed. It would be far preferable, in my view, to determine the interplay of *Reyno* and the Jones Act in a case where the question is squarely presented and makes a difference to the result. I therefore do not join in footnote 25.

As to footnote 38, I join in Judge Gee's dissent.*

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* I agree that the question there considered is one of Louisiana law which we did not take this case en banc to resolve. However,

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring in the judgment:

I concur except in two regards. First, we ought not have treated the Jones Act issue, although I am persuaded by Judge Hill's writing that we should not have a separate forum non conveniens rule for Jones Act cases; nor should we have re-examined the panel's treatment of the Louisiana choice of law issue, an issue we did not take this case en banc to reconsider and which has been treated only in the opinion writing, able though that is.

Second, with deference, I am not persuaded by the analysis of the *Erie* question. I give greater weight to the interests favoring application of Louisiana law and less weight to the federal forum interest in self-administration. In more direct terms, I read *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), by a different light. The choice between a state or federal rule is in any event so close that I would silently join the majority if the rationale were not otherwise important.

Hanna involved a Federal Rule of Civil Procedure governed by the Rules Enabling Act; the *Hanna* court deferred to the Federal Rules, not because of federal forum interests inherent in article III, but because under the Rules Enabling Act, they were approved by Congress, the Advisory Committee, and the Supreme Court. Here we have a judge-made rule of forum non conveniens that displaces an arguably core decision of the state meant to assure its residents a forum in the United States.

Of course, federal courts have an interest in self-administration; they do in every *Erie* decision. But that interest must be viewed with caution when it lacks the

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inasmuch as the issue has nevertheless been addressed, and is presented by this appeal, I deem it appropriate to indicate my view in respect to it.

support of the Rules Enabling Act mandate or an independent constitutional interest such as the seventh amendment; these are important, sometimes the dispositive, variables in an *Erie* analysis.

On the state side, it must not be forgotten that Louisiana has no doctrine of forum non conveniens. That is, Louisiana has not accepted the idea that its citizens may be denied the right to a court in the United States for reasons of efficiency or to otherwise husband judicially found resources. We are not choosing between a federal and state rule in circumstances where the federal formulation of a rule, while securing interests similar to a state rule, leads to a different result. Rather, we are asked to reject a decision by Louisiana that lies closer to substance on the spectrum of substance to procedure than would an adopted rule of forum non conveniens.

I

The majority states that "our task is to evaluate whether applying federal *forum non conveniens* in this case advances or hinders the 'twin aims' of *Erie*." In *Hanna*, the Court identified the twin aims of *Erie* as (1) discouragement of forum shopping and (2) avoidance of the inequitable administration of the laws. *Hanna*, 380 U.S. at 468, 85 S.Ct. at 1142. The majority contends that the second aim, avoidance of the inequitable administration of the laws, can refer either to extrinsic considerations of the fairness of the competing state and federal rules to the parties, or to intrinsic considerations of the federal forum's own interests. The majority concludes that "*Hanna* intends the latter." But *Hanna* was concerned about the unfairness to citizens of the forum state when different rules are applied in state and federal courts in diversity.

When the *Hanna* court spoke of the twin aims of *Erie*, it also stated, "the *Erie* rule is rooted in part in a realization that it would be unfair for the character or re-

sult of a litigation materially to differ because the suit had been brought in a federal court." *Id.* at 467, 85 S.Ct. at 1141. The *Hanna* court then quoted from *Erie* to explain its point:

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* [41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842)] introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law.

Id. (quoting *Erie Railroad v. Tompkins*, 304 U.S. 64, 74-75, 58 S.Ct. 817, 820-21, 82 L.Ed. 1188 (1938)). The *Hanna* court then added, "The [*Erie*] decision was also in part a reaction to the practice of 'forum-shopping' which had grown up in response to the rule of *Swift-Tyson.*" *Id.* Thus, the twin aims of *Erie*, according to the author of *Hanna*, are discouraging forum-shopping and avoiding discrimination against citizens of the forum state by non-citizens.

Further evidence that the *Hanna* court was referring to unfairness to citizens of the forum state when it stated that the second aim of *Erie* was avoidance of inequitable administration of the laws is found in footnote 9 of the opinion:

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the charac-

> ter or result of the litigation that failure to enforce it *would unfairly discriminate against citizens of the forum State*, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

Id. n. 9. (emphasis added). Nothing in *Hanna* suggests, as the majority does, that "inequitable administration of the laws" describes the interests of the federal forum.

The majority avoids the constraint of *Hanna*'s text and argues that the "equal protection" interpretation cannot be correct because it

> would take federal courts into an analysis of the "fairness" of the state rule, in other words, its wisdom and propriety. This could only lead to normative assertions by federal courts that a given state law cannot be applied because to do so would be "inequitable." But it was precisely this normative role, this role of federal courts as prophets of a "brooding omnipresence," that *Erie* condemned. Therefore, *Hanna*'s second aim must refer to the federal courts' own interests in equitable self-administration.

I am not persuaded because as I read it, *Hanna* made clear that the "inequitable administration" concern does not involve a bald evaluation of the fairness of the state rule (an exercise that would be rightfully rejected); rather it asks "whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would *unfairly discriminate* against citizens of the forum State." *Id.* n. 9 (emphasis added).

The twin aims of *Erie* are *not* competing aims. Indeed, they arise from the same source and serve related purposes. If a federal court in diversity applies a tort rule

different from the state rule, and the federal rule requires a result opposite to what would be had in state court, then litigants will shop for the forum with the rule favoring their position, *and* a citizen of the state being sued in federal court will not have the same protection of the laws as he would had he been sued in his state's court. This says nothing of the "wisdom and propriety" of the tort rule.[1] I take comfort from the *Hanna* Court's purpose in identifying the twin aims of *Erie:* to explain the contours of the "outcome-determinative" test. The fact that different federal and state rules result in conflicting outcomes matters only to the extent that it gives rise to forum shopping or unfair discrimination against citizens of the forum state.

Finally, the *Hanna* Court's very application of the twin-aims-of-*Erie* analysis to the issue before it suggests that the Court's focus was upon forum-shopping and discrimination against citizens of the forum state, rather than the needs of the federal forum *qua* forum. The issue in *Hanna* was whether service of process must be made in the manner prescribed by state law or that set forth in Fed.R.Civ.P. 4(d)(1). Although the service had satisfied the federal requirements, it did not comply with state law. The Court, after discussing the two purposes served by the outcome-determinative test, noted:

> Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the

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[1] Ironically, however, the doctrine of forum non conveniens does take the federal courts into an analysis of the "wisdom and propriety" of exercising jurisdiction. The application of forum non conveniens in conjunction with removal jurisdiction effectively imposes on the citizens of the forum state the federal court "wisdom" not to exercise jurisdiction.

> state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife [the federal rule] to take the place of in-hand service of defendant himself [the state rule] alters the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to cause the sort of equal protection problems to which the *Erie* opinion alluded.

Id. 380 U.S. at 469, 85 S.Ct. at 1142-43 (footnotes omitted).

I see *two* interests weighing in favor of applying state law—the twin aims of *Erie*. But as a result of its interpretation of *Hanna*, the majority drops away the related, second interest—avoidance of discrimination against citizens of the forum state.

In refusing to apply forum non conveniens, Louisiana has decided to provide greater protection against foreign actors, through access to local courts, than is available in federal courts. Application of the federal rule in diversity will have the potential of depriving the forum state's citizen of the material benefit of a convenient and friendly forum. Thus, although this case involves a twist on the typical *Erie* case—the nonresident defendants receive the benefits from the choice of forum—the attending discrimination against citizens of the forum state is no less real.

II

Just as the majority's interpretation of the twin aims of *Erie* places too *little* emphasis on the state law interests, it likewise places too *much* emphasis on the federal forum interests in self-administration. The majority argues that "*Hanna* gives us good reason to hold that federal courts have inherent powers under Article III to displace state laws on matters involving their basic

competence as courts." The majority reasons that because *Hanna* "held that *Congress* has the power to override state law by the Federal Rules in 'matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either,'" (quoting *Hanna*, 380 U.S. at 472, 85 S.Ct. at 1144) (emphasis added), the *federal courts* have a general power in matters involving their basic competence as courts to override state laws. This slights the fact that *Hanna* involved the question of the validity of a federal rule of civil procedure under the Enabling Act. As the Court in *Hanna* noted:

> [I]n cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie*, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in *Sibbach* [*v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941)].

Hanna, 380 U.S. at 470-71, 85 S.Ct. at 1143-44 (citation omitted). The Court further explained that

> [w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471, 85 S.Ct. at 1144 (footnote omitted); *see also Burlington Northern Railroad v. Woods*, —— U.S. ——, ——, 107 S.Ct. 967, 970, 94 L.Ed.2d 1, 7 (1987) (Fed. R.App.P. 38 applies in diversity suit instead of conflicting state rule). It was in this context then that the Court in *Hanna* held that

> the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id. 380 U.S. at 472, 85 S.Ct. at 1144. However, *Hanna* does not give *federal courts* the power, beyond the mandate of the Enabling Act or other such statute, "to displace state laws on matters involving their basic competence as courts" without being subjected to the strictures of *Erie*.

The majority argues that such power is inherent in article III, but the Court in *Hanna* stated that the Constitution placed in the hands of Congress the primary power to make rules governing the practice and procedure in federal courts. *Id.* at 473, 85 S.Ct. at 1145; *see also* C. Wright, A. Miller & E. Cooper, 19 *Federal Practice and Procedure*, § 4509 at 140 (1982). I concede that a federal court possesses a *secondary* power of self-management under article III. But I do not think the forum non conveniens doctrine, which undoubtedly falls into the arguable area between substance and procedure, is entitled to the same presumption of validity in diversity as the Federal Rules of Civil Procedure. Rather, forum non conveniens must survive, if at all, under the standard of *Erie* and at its progeny. We should look to *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), rather than *Hanna*, for the proper *Erie* analysis.

III

In *Byrd*, the plaintiff, an employee of a contractor that was working for a utility company, was injured while connecting power lines for the utility. The plaintiff

brought a diversity suit against the utility for negligence. The utility asserted as an affirmative defense that the plaintiff was its employee within the meaning of the South Carolina Workmen's Compensation Act, and the plaintiff's exclusive remedy was thus compensation benefits under the Act. The *Erie* question was whether the factual issues raised by the affirmative defense were to be decided by the judge or the jury. State law required the judge alone to decide on the evidence whether a defendant was a statutory employer. Federal law required that all disputed questions of fact be decided by the jury. The Supreme Court held that federal law applied.

The *Byrd* Court employed a three-factor balancing test to conclude that federal law applied: (1) the significance or substantive character of the state rule under state law and (2) the likelihood of different outcomes, were weighed against (3) the importance of the federal interests or policies underlying the competing federal rule. *Byrd*, 356 U.S. at 535-40, 78 S.Ct. at 899-902. In weighing these interests the Court noted that the state rule did not rest on any special policy of the state compensation law; nor was the choice of rules here likely to give rise to forum-shopping. On the other hand the Court identified important federal interests at stake:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Id. at 537, 78 S.Ct. at 901 (footnotes omitted; citation omitted).

The Fifth Circuit considered similar questions in *Boeing v. Shipman*, 411 F.2d 365, 369-70 (5th Cir.1969) (en

banc), and *Jones v. Benefit Trust Life Insurance Co.*, 800 F.2d 1397, 1400 (5th Cir.1986). In *Boeing*, the issue was whether the federal courts should apply a federal rather than a state test to determine the sufficiency of the evidence to create a jury question. The court, relying on *Byrd* and *Planters Manufacturing Co. v. Protection Mutual Insurance Co.*, 380 F.2d 869 (5th Cir.), *cert. denied*, 389 U.S. 930, 88 S.Ct. 293, 19 L.Ed.2d 282 (1967), held that the federal test applied in diversity cases. The court reasoned that "[f]ederal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve 'the essential character' of the federal judicial system." *Boeing*, 411 F.2d at 369-70. The court had reached the same result in *Planters*. There Judge Tuttle explicitly acknowledged the impact of the seventh amendment on the question: "If the seventh amendment requires uniformity in the exercise of the jury trial right in the federal courts, surely that subsumes uniformity in the exercise of the power to direct a verdict or grant a judgment n.o.v." *Planters*, 380 F.2d at 871.

In *Jones*, the Erie question again involved the court's division of responsibility between judge and jury. The state law required that the trial judge first determine for himself that a defendant insurer had no "reasonably arguable" basis for denying coverage before submitting the question of punitive damages to the jury. The Fifth Circuit held, without discussion, that the federal rule governed. *Jones*, 800 F.2d at 1400. As in *Byrd*, *Planters*, and *Boeing*, the seventh amendment's influence in *Jones* is undeniable. Thus, in my view, *Boeing* and *Jones* are correct not, as the majority suggests, "because the relationship between judge and jury goes to the heart of the independence and integrity of an Article III court," but because the seventh amendment sets one standard for all federal courts for defining the relationship between judge and jury. This interest in uniformity is a powerful fed-

eral interest that overwhelms the limited state interest in state rules that would leave for jury decision more than is constitutionally required, rules that implement but are not integral to policies of substance.

IV

Finally, I disagree with the suggestion in the majority opinion that *Byrd* gives too little recognition to the federal interest in self-administration and that *Hanna* gives more; that under the authority of *Hanna*, we can dispense with *Byrd* altogether.

In my view the Supreme Court's cases must be read together. As Professor Wright put it: "Although Hanna is the Supreme Court's last major contribution to the Erie doctrine, the other principal cases—Erie, York, and Byrd—certainly cannot be disregarded. The four decisions build upon and inform one another." 19 Wright, Miller & Cooper, *supra*, § 4504 at 44.[2] As I have explained, *Hanna* gives more weight to federal forum interests only in the sense that the Enabling Act gives more. But *Hanna* is explicit that in cases not arising under the Enabling Act, we must look to *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) (state statute of limitations bars diversity suit) and *Byrd*. *Hanna*, 380 U.S. at 469-70, 85 S.Ct. at 1142-43.

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[2] Professor Wright in his separate discussion of forum non conveniens in a different volume, states: "Although the Supreme Court has repeatedly found that it did not need to decide whether state notions of forum non conveniens were binding on a federal court in a diversity action, it seeems quite clear that they ought not to be and that these are matters of the administration of the federal courts, not rules of decision, so the state rules cannot be controlling." 15 Wright, Miller & Cooper, *supra*, § 3828 at 293-94 (footnotes omitted); but he there addresses a choice between federal and state rules not the use of a federal rule when a state has rejected the concept.

Byrd gives all the recognition to federal forum interests that is warranted under the Constitution. In most if not all *Erie* cases, the federal forum's interest in self-administration is present. *Byrd* suggests that this interest in self-administration outweighs the policies underlying the state law and the interests embodied in *Erie* only when it is bolstered by other uniquely federal interests—in *Byrd* the seventh amendment. Indeed, five years after the decision in *Byrd*, the Supreme Court held that federal rather than state law "governs in determining whether an action is 'legal' or 'equitable' for the purpose of deciding whether a claimant has a right to a jury trial." *Simler v. Conner*, 372 U.S. 221, 221, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963) (per curiam). The Court, citing *Byrd*, explained that "[t]he federal policy favoring jury trials is of historic and continuing strength. . . . Only through a holding that a jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." *Id.* at 222, 83 S.Ct. at 610 (citations omitted; footnote omitted).

To give this federal interest in self-administration even more weight means that judge-made rules like forum non conveniens having some affect on federal court administration would be accorded deferential review comparable to the presumption of validity given Federal Rules. We thus would have moved to the opposite extreme of *York*. As Justice Harlan explained in his concurrence in *Hanna*:

> Whereas the unadulterated outcome and forum-shopping tests may err too far toward honoring state rules, I submit that the Court's "arguably procedural, ergo constitutional" test moves too fast and far in the other direction.

Hanna, 380 U.S. at 476, 85 S.Ct. at 1146-47 (Harlan, J., concurring). Justice Harlan's words, which gave reason

to pause in *Hanna*, applies with even greater force in cases like the present one, outside the bounds of the Enabling Act.

But having said all of this, whether Louisiana's rejection of a doctrine of forum non conveniens is such an exercise of the state's primary power to define the substantive rights of tortfeasors that it ought not be displaced by a rule of administration constructed by federal judges remains a close question; its efficiency concerns so inevitably drive away from substantive policy that one's immediate reaction is that application of a federal rule is surely correct. But I am not so sure when the choice is not between competing rules but between a federal rule and a state's rejection of the doctrine. Regardless, the outcome is not the foundation of my disagreement.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 84-3832, 84-3833

IN RE AIR CRASH DISASTER NEAR NEW ORLEANS, LOUISIANA ON JULY 9, 1982

LOUIS ALBERTO TRIVELLONI-LORENZI, and
SUSANA ELECTRA TRIVELLONI-LORENZI,
Plaintiffs-Appellees,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Defendants-Appellants.

ERNESTO SERIO PAMPIN LOPEZ, Individually and
As Administrator of the Estate of His Deceased Mother
SARA E. LOPEZ DE PAMPIN,
Plaintiff-Appellee,

v.

PAN AMERICAN WORLD AIRWAYS, INC. and
UNITED STATES OF AMERICA,
Defendants-Appellants.

May 7, 1986

Rehearing Granted July 8, 1986.

Appeals from the United States District Court for the Eastern District of Louisiana

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Deutsch, Kerrigan & Stiles, Francis G. Weller, Frederick R. Bott, Darrell K. Cherry, Robert E. Kerrigan, Jr., New Orleans, La., for defendants-appellants.

Patricia R. Murray, Stephen B. Murray, Romualdo Gonzalez, New Orleans, La., for plaintiffs-appellees.

Before: GARZA, POLITZ and HILL, Circuit Judges.

OPINION

POLITZ, Circuit Judge:

This chapter in the continuing judicial terminus of the claims arising out of the crash of Pan American World Airways Flight 759 on takeoff from Moisant International Airport on July 9, 1982, presents several issues: (1) application of the rubric of *forum non conveniens*; (2) Warsaw Convention limitation of liability; and (3) as to the damage awards, questions of excessiveness, discounting, prejudgment interest, and allowance of preimpact and postimpact recovery. We affirm in part, reverse in part, and remand.

BACKGROUND

The plaintiffs in these consolidated cases are citizens and residents of Uruguay, and are heirs of passengers killed in that disastrous flight. Luis Alberto and Susana Electra Trivelloni-Lorenzi are the children of Luis Alberto and Electra Iris Trivelloni who were victims of the crash. Ernesto Serio Pampin-Lopez seeks damages for the deaths of his mother Sara Lopez de Pampin, his sister Maria Amparo Pampin-Lopez, and his aunt Irma Lopez de Alvarez. The decedents were on a vacation trip to the

United States and were en route to Las Vegas prior to returning home.

In August 1982 suit was filed against Pan Am and other defendants.[1] In April 1983 administrative claims under the Federal Tort Claims Act were commenced against the United States, which was, in due course, added as a defendant. Prior to the rejection of the administrative claim under the FTCA which allowed the joining of the United States as a defendant, Pan Am made known its intention to move for a dismissal on the grounds of *forum non conveniens.*

In connection with the motion, Pan Am made known its willingness to: (1) submit to the jurisdiction of the courts of Uruguay, (2) concede liability, (3) waive any statute of limitations defense, (4) waive the Warsaw Convention limitation of damages, and (5) guarantee satisfaction of any judgment entered against it in Uruguay. In response to Pan Am's declaration of intent, the district court, in an effort to expedite matters, made known its proposed ruling. Anticipating the government as a defendant the court advised counsel: "You have no right to that transfer. . . . We're going to trial here on damages, with the government as a defendant and with the crash happening here." Pan Am subsequently submitted its motion, which was denied. Thereafter, immediately upon completion of the administrative process, the United States was made a party-defendant in both suits.

Pan Am then sought the application of Uruguayan law to the claims, apparently submitting with its motion two memoranda, neither of which is before us. Finding that Pan Am had failed to show any significant difference between the law of Uruguay and that of Louisiana, the district court denied the motion. Notwithstanding the prior adverse choice-of-law ruling, Pan Am then moved

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[1] Pursuant to a joint stipulation, all defendants other than Pan Am and the United States were dismissed.

to dismiss the claims for preimpact and postimpact pain and suffering on the grounds that such damages were not recoverable under Uruguayan law. Referring to its prior order, the court denied these motions.

On the eve of trial Pampin sought the application of Uruguayan law insofar as it recognized a nephew's claim for the wrongful death of an aunt, a claim not recognized under Louisiana law. In orally granting the motion the court stated:

> The reason that we continue to [apply] Louisiana law is because the law of Louisiana in conflicts . . . is that Louisiana will apply its own law unless the domiciliary state has some interest in applying its own law. The domiciliary state in none of these cases, save one, has ever had any interest that [Pan Am] could demonstrate that the domiciliary state would have an interest in applying its law. Now [the case of Alvarez] would be one. . . . Nobody has ever demonstrated that Uruguay would say, wait, Louisiana, we want you to hurt our citizen by applying the Uruguayan law and help Pan Am or the United States Government.
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> * * * *
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> You've got a dead person [Alvarez]. Louisiana law says under [La.Civ.Code Art.] 2315 nobody can recover . . . for [Alvarez's] death. There's no 2315 survivor. Uruguay says, for this deceased person [Alvarez], here's who recovers [*i.e.*, Pampin]. Louisiana says, oh, Uruguay, you're the domicile nation. Do you have an interest . . . in applying your own law? To which [Uruguay] says, bet your fanny we do. We have a law that says [nephews] recover.
>
> Louisiana says, fine, we'll apply that. Now, we have another dead person . . ., another Pampin. . . . Louisiana's 2315 says child, mother, whoever recovers. Louisiana turns to Uruguay and says, do

> you have an interest in saying somebody else recovers besides these? And Uruguay says, no, we have no interest in that. So Louisiana says, fine, we'll apply our law then. That is the law of Louisiana.

The trial court also granted plaintiff's *in limine* motion to strike Pan Am's defense which sought to invoke the damage limitation for the death of international passengers imposed by the Warsaw Convention as modified by the Montreal Agreement. The Montreal Agreement requires that the notice of limited liability be furnished to the passengers in writing in ten-point type. The notice on the tickets of the five decedents was printed in nine-point type. Because of this failure of compliance with the Montreal Agreement, the district court declined to impose the $75,000 death-claim limit.

Upon completion of all pretrial matters the cases proceeded to trial and a jury was selected for each. The trials began physically consolidated, both juries simultaneously heard the testimony of two witnesses to the crash, Opal Bode and Evelyn Pourciau, and that of an anthropologist from Tulane University, who testified about South American mores and familial relations. The trials were then separated for the presentation of other evidence and further proceedings.

The Trivelloni jury awarded $25,000 each for the preimpact pain and suffering of Luis and Electra Trivelloni, $75,000 to each plaintiff for the death of both parents, and $3530 for loss of their parents' personal effects, a total of $203,530 for the two Trivelloni plaintiffs.

The Pampin jury awarded Ernesto Pampin $25,000 for the preimpact pain and suffering of each of the three victims, $12,000 for the postimpact pain and suffering of Irma Lopez de Alvarez, $250,000 for the death of his mother, $150,000 for the death of his sister, $13,000 for the death of his aunt, and $16,853.89 for loss of their personal possessions, for a total of $516,853.89.

The district court denied all posttrial motions and this appeal was timely noted.

ANALYSIS

1. Forum non conveniens and choice of law.

Pan Am maintains that the district court erred by failing to dismiss the suits on the grounds for *forum non conveniens*, by applying Louisiana law in resolution of the claims, and by applying Uruguayan law in recognizing Pampin's claim for the death of his aunt. Pan Am contends that since the district court did not give comprehensive consideration to the factors enunciated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947),[2] as refined in *Piper Aircraft Co. v. Reyno*,

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[2] In *Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843, the Supreme Court taught:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their

454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), we should do so. Pan Am suggests that a proper application of these factors would result in a dismissal of these actions.[3]

It is too well-settled to permit of argument that the first determination which must be made in deciding the *forum non conveniens* conundrum respects the choice-of-law. Which country's law is to be applied? The court must first determine whether American or foreign law governs the lawsuit. *McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313 (5th Cir.1986); *Cuevas v. Reading & Bates Corp.*, 770 F.2d 1371 (5th Cir.1985); *In re McClelland Engineers, Inc.*, 742 F.2d 837 (5th Cir. 1984), *cert. denied sub nom. Munusamy v. McClelland Engineers, Inc.*, —— U.S. ——, 105 S.Ct. 1228, 84 L.Ed. 2d 366 (1985); *Koke v. Phillips Petroleum Co.*, 730 F.2d 211 (5th Cir.1984). If American law, either federal or state, applies to the action, the federal court should retain jurisdiction; if foreign law applies, dismissal may be appropriate if there exists a more convenient forum. *Cuevas*; *Koke*; *DeOliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir.1983); *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir.1980), *cert. denied sub nom. Valmas Bros. Shipping, S.A. v. Fisher*, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981); *cf. Reyno*. Our first in-

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view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

[3] We need not address the open question whether we are bound by Louisiana *forum non conveniens* doctrine or federal doctrine, *see Reyno*, 454 U.S. at 248 n.13, 102 S.Ct. at 262 n.13, since Louisiana courts apply the *Gulf Oil* analysis. *Smith v. Globe Indemnity Co.*, 243 So.2d 882 (La. App. 1971); La. C.C.P. art. 123.

quiry is whether the district court erred in its decision to apply Louisiana law to the claims resulting from the deaths of four of the five decedents.

In these diversity cases we are *Erie*-bound to apply Louisiana's choice-of-law rules to the claims against Pan Am, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), and against the United States, *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Louisiana utilizes a two-step process in resolving the choice-of-law issue. The court must first decide whether a "true conflict" exists; do both states have an actual and real interest in the application of its law. If both states do, the court is to apply the law of the jurisdiction with the most significant contacts with the case. *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293 (5th Cir.1982); *Burns v. Holiday Travels, Inc.*, 459 So.2d 666 (La.App.1984); *Lee v. Ford Motor Co.*, 457 So.2d 193 (La.App.), *writ denied*, 461 So.2d 319 (La.1984); *Shaw v. Ferguson*, 437 So.2d 319 (La.App.1983); *see also Jagers v. Royal Indemnity Co.*, 276 So.2d 309 (La.1973). Both questions are answered by reference to the *Restatement (Second) on Conflict of Laws*. *Brannon v. Babin*, 366 So.2d 955 (La.App. 1978); *Sutton v. Langley*, 330 So.2d 321 (La.App.), *writs denied*, 332 So.2d 805 and 333 So.2d 242 (La.1976).

Pan Am contends that since its proffered stipulation left only the question of damages. Uruguay, the domicile of both plaintiffs and decendents, is the only jurisdiction with an interest in the amount of recovery and its law should be applied. *See, e.g., Mahfoud v. Eastern Airlines, Inc.*, 17 Avi.Cases (CCH) 17,714 (W.D.La.1982), *aff'd*, 729 F.2d 777 (5th Cir.1984), *aff'd on other grounds by an equally divided court*, 474 U.S. ——, 106 S.Ct. 586, 88 L.Ed.2d 522 (1985); *Guillory v. United States*, 699 F.2d 781 (5th Cir.1983) (Texas law applying *Second Restatement*); *Sibley v. KLM*, 454 F.Supp. 425 (S.D.N.Y.1978); *Junco v. Eastern Airlines, Inc.*, 399 F.Supp. 666 (S.D.

N.Y.1975), *aff'd*, 538 F.2d 310 (2d Cir.1976); *Gordon v. Eastern Airlines, Inc.*, 391 F.Supp. 31 (S.D.N.Y.1975); *Manos v. TWA, Inc.*, 295 F.Supp. 1170 (N.D.Ill.1969); *Reich v. Purcell*, 67 Cal.2d 551, 63 Cal.Rptr. 31, 432 P.2d 727 (1967); *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 266 N.Y.S.2d 513, 213 N.E.2d 796 (1965); *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964); *but see* Reese, *The Law Governing Airplane Accidents*, 39 Wash. & Lee L.Rev. 1303 (1982).

At first blush it would appear that Uruguay has the most significant interest in these cases. Upon closer examination, this appearance fades. It is obviously in Uruguay's interest that its citizens be fairly compensated for the wrongful death of family members. But once it is determined that recovery under Louisiana law equals or exceeds that available under Uruguayan law, the interest of Uruguay recedes. If the law of Louisiana provides more compensation for these losses than does the law of Uruguay, it is beyond the pale of reason to conclude that Uruguay would have an interest in prohibiting the award, provided no Uruguayan defendant is involved. We are persuaded that the needs of the international system will be served best in this instance by application of the law of Louisiana. *Restatement (Second) on Conflict of Laws* § 6(2)(a).

Similarly, under §§ 175 and 178 of the *Restatement (Second) on Conflict of Laws*, the law of Louisiana as the place of injury would apply absent a strong, countervailing Uruguayan interest. No such interest was demonstrated. We therefore conclude that the Louisiana courts would apply Louisiana law in these cases, consistent with the principles expressed in the referenced *Second Restatement* sections. We affirm the district court's conclusion. *See Price v. Litton Systems, Inc.*, 784 F.2d 600 (5th Cir. 1986) (weighing *Second Restatement* factors); *see also O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842 (2d Cir. 1984) (applying New York law).

Based on this reasoning, we find no error in the district court's application of Uruguayan law recognizing Pampin's claim for the death of his aunt. Louisiana law provided no remedy; the law of Uruguay did. Under §§ 175 and 178 of the *Restatement (Second) on Conflict of Laws*, the law of Uruguay was applied appropriately.[4]

We agree with the district court's choice-of-law determination. Louisiana law properly was made applicable to all elements of the damages claim except for the nephew/aunt status question resolved under Uruguayan law. That being so, the district court's ruling on the *forum non conveniens* motion will be upheld unless the private-interest and public-interest factors of *Gulf Oil*, set forth in footnote 2, compel otherwise. A studied review of the private interests of the litigants, and the public interest factors set forth in *Gulf Oil* does not result in the conclusion that a dismissal was compelled. Indeed, a casual review reflects that the enumerated factors do not even preponderate, in this case, in favor of dismissal on the grounds of *forum non conveniens*. The very reverse is manifest. These cases should have been tried in the very forum in which they were tried, the place where this tragic accident occurred. The trial court correctly denied the motion to dismiss on the grounds of *forum non conveniens*.

2. *Limitation of liability.*

Pan Am argues that the district court erred in failing to apply the $75,000 limitation for the wrongful death

[4] Pan Am also argues that even if Uruguayan law is applied to Pampin's claims for Alvarez's death, he may not recover because he failed to show that he was the succession representative of Alvarez's estate. Pampin demonstrated that under Uruguayan law a nephew may recover damages for the wrongful death of his aunt. That showing satisfies Fed. R. Civ. P. 44.1. Pan Am's claim that Pampin could not recover for Alvarez's death unless he had been appointed succession representative was unsupported by any Uruguayan authority. The district court properly rejected this assertion.

of an international traveler, prescribed by the Warsaw Convention, as modified by the Montreal Agreement of 1971. *See* Order E-23,680, Docket No. 17,325 (CAB 1966), *reprinted at* 31 Fed.Reg. 7302 (1966); see also 14 C.F.R. §§ 203.1 *et seq.* It is conceded that the notice of limitation of liability given to the decedents was in nine-point type, not in the required ten-point type. Pan Am argues that the difference in the size of the type is of no consequence, that the notice was legible and sufficient.

We are not persuaded. We agree with our colleagues of the Second Circuit who rejected this argument in *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze v. Robles*, 464 U.S. 845, 104 S.Ct. 147, 78 L.Ed.2d 138, *reh'g den.*, 464 U.S. 978, 104 S.Ct. 416, 78 L.Ed.2d 353 (1983) (8.5 point type). We accept and adopt the reasons assigned by Judge Oakes for the Second Circuit panel in concluding that 10-point type means exactly that, 10-point type. We affirm the judgment of the district court striking the liability-limitations defense.

3. *Preimpact damages.*

Both juries heard the same testimony relevant to preimpact mental pain and suffering. Both independently returned verdicts of $25,000 for the injury sustained by each of the five decedents. Appellants contend that these awards lacked any evidentiary basis. Albeit sparse, the evidence presented was sufficient to posit a jury question.

The juries heard the testimony of Opal Bode and Evelyn Pourciau who were on the ground near the point of impact. Pourciau testified that because of the location of her house she had heard many aircraft but the engines of this one were "not running right." Hearing trees cracking she looked up and saw the plane with its wings perpendicular to the ground. Moments later it crashed, exploded, and burned. Sparse though it may

be, this was sufficient evidence to raise a jury issue. The combination of circumstances, the unusual sound of the engines, the violent maneuvering of the large aircraft until it was flying 90° off level, with a wingtip smashing trees as it plummeted to the ground, provided an adequate basis from which the jury could draw reasonable inferences about the mental state of the passengers in the final seconds before the disastrous impact. We find a sufficient evidentiary basis for an award of preimpact fear and anguish. *Pregeant v. Pan American World Airways, Inc.*, 762 F.2d 1245 (5th Cir. 1985); *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984). We are persuaded, however, that the amount awarded is excessive in each instance.

There is much disagreement over the determination of a proper award for nonpecuniary damages. For example *see In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1160 (5th Cir.1985) (Tate, J., dissenting) (*Giancontieri*). But there is little disagreement over the controlling rubrics by which we assess a jury's award, particularly one which has passed muster before the trial judge. We capsulated the rules in *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983), reminding that "the jury's award is not to be disturbed unless it is entirely disproportionate to the injury . . . so large as to 'shock the judicial conscience,' . . . so exaggerated as to indicate 'bias, passion, prejudice, corruption, or other improper motive.'" 705 F.2d at 784 (footnotes omitted). We are not dealing with mere semantics.

In *Haley* we upheld an award of $15,000 for preimpact anguish; in *Pregeant* $16,000 was affirmed. However the quantity and quality of the evidence in *Haley* and *Pregeant* exceeded that presented to the Trivelloni and Pampin juries. In the earlier cases there was evidence simulating the takeoff and crash, and psychiatric testimony about the probable condition and reaction of the passengers. The record before us contains no such evi-

dence. As a consequence, we are convinced that the $25,000 award for the preimpact suffering of the decedents far exceeds this circuit's maximum recovery rule. On the evidence presented, those awards should not have exceeded $7,500 for each decedent. Appellees will be given the option of a remittitur of $17,500 on each preimpact damage award, or a new trial on that element of damages.

4. *Postimpact damages.*

The only award for postimpact damages related to Pampin's aunt. Pan Am argues the lack of a sufficient evidentiary base here as well. We find otherwise.

In support of this claim Pampin points to the testimony of Opal Bode and Dr. Alvaro Hunt, a forensic pathologist in the office of the Coroner of Jefferson Parish, Louisiana. Mrs. Bode, whose home was only a few feet from the point of impact, testified that she heard screams coming from the burning fuselage after the plane crashed and before it exploded. Dr. Hunt's testimony and the autopsy report showed that Ms. Alvarez died from third-degree burns and charring over 95% of her body. No limb severance or other trauma was observable. Her hands and feet were burned off. Autopsies of the other Pampins, seated next to Ms. Alvarez, reflected that they died of massive traumatic injuries sustained at the moment of impact. Ms. Alvarez had no such injuries.

In *Pregeant* we upheld an award for postimpact pain and suffering by another victim of this crash. Dr. Hunt could not testify if Ms. Alvarez was conscious after impact, but based on his findings he concluded that if she was conscious it would have taken several seconds before she lost consciousness from the flash fire and explosion. In *Pregeant* we recognized that no one could know with certainty who was not conscious after impact. But the

jury may draw reasonable inferences from the evidence. Although the question is obviously close, the nature of Alvarez's injuries, as compared to the injuries of those around her, and the reason assigned for her death, as compared to the deaths of the others, and the testimony of Opal Bode about the screams after impact, provided the jury with the basis for a reasonable inference that Ms. Alvarez was conscious briefly and suffered post-impact pain and suffering. The award for that injury is upheld.

5. *Love and affection awards.*

Pan Am challenges the awards to the 25 year-old Pampin of $250,000 for the loss of his 52 year-old mother's love and affection and $150,000 for the loss of love and affection of his sister. The evidence reflects that there was an intimate, loving relationship existing between Pampin and his mother and sister. There were daily contacts encompassing every facet of their lives. When Pampin married, rather than draw away from his consanguineal family, he brought his wife into that close unit. They worked, lived, and played together. Pampin looked to his principled and strong-charactered mother for guidance and advice in personal and business matters. The camaraderie existing between Pampin and his sister, playful and good-natured, had an almost storybook quality. Pampin lost the majority of his family in this accident. Though difficult to measure, the magnitude of the multiple loss must be given consideration.

We are not prepared to say that the award for the death of Pampin's mother crosses the "shocking the judicial conscience and reflecting bias, passion, prejudice, corruption, or other improper motive" threshold. We decline to disturb the jury's assessment of that nonpecuniary loss. But the award for the death of the sister does cross that threshold. A review of all similar cases, state and federal, discloses no support for an award of $150,000

for the loss of love and affection of a sibling. Applying our maximum recovery rule, we conclude that the maximum nonpecuniary recovery for this loss is $50,000. A remittitur of $100,000 or a new trial on this element of damages is ordered.

6. *Discounting of damages.*

Pan Am next argues that the district court erred in not charging the juries to discount the awards of damages for loss of love and affection. Pan Am argues that damages for loss of love and affection compensate a plaintiff for future loss as well as present loss of the decedent's love and affection and therefore should be discounted to reflect present value. In support of its position, Pan Am cites *Metz v. United Technologies Corp.*, 754 F.2d 63 (2d Cir. 1985), in which the Second Circuit, interpreting Louisiana law, held that an award of damages for future pain and suffering in a personal injury action should be discounted.

As an *Erie* court, we must resolve this issue by applying Louisiana law. *Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 52 n. 10 (2d Cir. 1984); *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842, 857 n. 24 (2d Cir.1984); *see* Devitt & Blackmar, 3 *Federal Jury Practice and Instructions* § 85.13 (3d ed. 1977). We find *Metz* inapposite; it deals only with awards for future pain and suffering in a personal injury action.[5] Although we find no dispositive Louisiana precedent, we are unpersuaded that Pan Am's contention is supported by Louisiana law, whatever its logic as a matter of economics.

In a wrongful death action under article 2315 of the Louisiana Civil Code, loss of society is considered an

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[5] In *Metz* the Second Circuit appeared to be following its own rule on this issue, *Chiarello v. Domenico Bus Service*, 542 F.2d 883 (2d Cir. 1976); *DeChico v. Metro-North Commuter R.R.*, 758 F.2d 856 (2d Cir. 1985). For the majority rule *see* Devitt & Blackmar, 3 *Federal Jury Practice and Instructions* § 85.13 (3d ed. 1977).

"immediate" damage, not a future or prospective damage. *See Andrus v. White*, 101 So.2d 7 (La. App.), *reversed in part on other grounds*, 236 La. 28, 106 So.2d 705 (1958); Comment, *Elements of Damages for Wrongful Death in Louisiana*, 20 La.L.Rev. 357 (1960), *reprinted in Studies in Louisiana Torts Law*, 590 (Malone & Guerry, eds., 1970); *see also Brown v. S.A. Bourg & Sons, Inc.*, 239 La. 473, 118 So.2d 891 (1960) (discounting award for future support but not for loss of love and affection in wrongful death case); *Duvernay v. State*, 433 So.2d 254 (La.App.), *writ denied*, 440 So.2d 254 (La.1983) (same); *see also McFarland v. Ill. Cent. R. Co.*, 241 La. 15, 127 So.2d 183 (1961). We therefore believe the district court, schooled and skilled in the law of Louisiana, did not err in refusing Pan Am's requested charge that damages for loss of love and affection be discounted to present value.

7. *Prejudgment interest.*

Pan Am contends that the computation of interest was erroneous for two reasons. First, it argues that interest should not have been awarded from the date of judicial demand on damages for loss of future love and affection. We reject this argument for the reasons assigned in section 6, *supra*.

Second, Pan Am points out that the judgment erroneously awards interest against the United States from the date of judicial demand. Pan Am is correct; the United States is liable for interest on an award only from the date of judgment. 28 U.S.C. § 2674. That portion of the judgment therefore must be vacated and a correct judgment entered on remand.

We AFFIRM in part, VACATE in part, REVERSE in part, and REMAND to the district court for entry of a judgment consistent herewith.

APPENDIX C

MDL 516

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 82-3475

SECTION "H"

IN RE: AIR CRASH DISASTER NEAR NEW ORLEANS, LOUISIANA, ON JULY 9, 1982

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his deceased mother, SARA E. LOPEZ DE PAMPIN

versus

PAN AMERICAN WORLD AIRWAYS, INC., THE BOEING COMPANY, and THE NEW ORLEANS AVIATION BOARD

JUDGMENT

Considering the answers of the jury to the interrogatories propounded by the court at the trial of this matter; and further considering the direction of the court as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Ernesto Serio Pampin Lopez, and against defendants, Pan American World Airways, Inc., and the United States of

America as follows, plus interest on each amount from date of judicial demand until paid, and for costs:

(a) For mental anguish suffered by decedent Sara Esther Lopez de Pampin prior to the first impact between the plane and the ground, in the amount of $25,000.00.

(b) For mental anguish suffered by decedent Maria Amparo Pampin-Lopez prior to the first impact between the plane and the ground, in the amount of $25,000.00.

(c) For mental anguish suffered by decedent Irma Lopez de Alvarez prior to the first impact between the plane and the ground, in the amount of $25,000.00.

(d) For the mental and physical pain and suffering suffered by decedent Irma Lopez de Alvarez from the time of the first impact between the plane and the ground until her death, in the amount of $12,000.00.

(e) For damages sustained for loss of love, affection and companionship:

As a result of the death of the death of Sara Esther Lopez de Pampin, in the amount of $250,000.00.

As a result of the death of Maria Amparo Pampin-Lopez, in the amount of $150,000.00. As a result of the death of Irma Lopez de Alvarez, in the amount of $13,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Ernesto Serio Pampin Lopez, Individually and as Administrator of the Estate of his deceased mother, Sara E. Lopez de Pampin, and against defendants, Pan Amer-

ican World Airways, Inc., and the United States of America, in the amount of $16,853.89, for the loss of personal effects of his three relatives.

New Orleans, Louisiana, this 30th day of August, 1984.

/s/ Adrian G. Duplantier
United States District Judge

APPENDIX D

MDL 516

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 82-3476

SECTION "H"

IN RE: AIR CRASH DISASTER NEAR NEW ORLEANS, LOUISIANA, ON JULY 9, 1982

LUIS ALBERTO TRIVELLONI-LORENZI,
SUSANA ELECTRA TRIVELLONI-LORENZI

versus

PAN AMERICAN WORLD AIRWAYS, INC.,
THE BOEING COMPANY, and
THE NEW ORLEANS AVIATION BOARD

JUDGMENT

Considering the answers of the jury to the interrogatories propounded by the court at the trial of this matter; and further considering the direction of the court as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs and against defendants, Pan American World Airways, Inc., and the United States of America, as follows, plus interest on each amount from date of judicial demand until paid, and for costs:

(a) In favor of Luis Alberto Trivelloni-Lorenzi and Susana Electra Trivelloni-Lorenzi, in the amount of $25,000.00, for mental anguish suffered by decedent Luis Alberto Trivelloni-Anselmi prior to the first impact between the plane and the ground.

(b) In favor of Luis Alberto Trivelloni-Lorenzi and Susana Electra Trivelloni-Lorenzi, in the amount of $25,000.00, for mental anguish suffered by decedent Electra Iriz Lorenzi de Trivelloni prior to the first impact between the plane and the ground.

(c) For damages sustained for loss of love, affection and companionship:

In favor of Luis Alberto Treivelloni-Lorenzi, as a result of the death of Luis Alberto Trivelloni-Anselmi, in the amount of $37,500.00.

In favor of Luis Alberto Treivelloni-Lorenzi, as a result of the death of Electra Iriz Lorenzi de Trivelloni, in the amount of $37,500.00.

In favor of Susana Electra Trivelloni-Lorenzi, as a result of the death of Luis Alberto Trivelloni-Anselmi, in the amount of $37,500.00.

In favor of Susana Electra Trivelloni-Lorenzi, as a result of the death of Electra Iriz Lorenzi de Trivelloni, in the amount of $37,500.00.

(d) For loss of personal effects of their parents, in the amount of $3,530.00.

New Orleans, Louisiana, this 30th day of August, 1984.

/s/ Adrian G. Duplantier
United States District Judge

APPENDIX E

Minute Entry Duplantier, J, May 21, 1984

MDL 516

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Nos.			
	82-3472	83-3392	83-3401
	82-3473	83-3395	83-3448
	82-3474	83-3396	
	*82-3475	83-3397	
	*82-3476	83-3399	
	83-3391	83-3400	

IN RE: AIR CRASH DISASTER AT NEW ORLEANS, LOUISIANA, JULY 9, 1982

The court has carefully considered the motion for partial summary judgment filed on behalf of plaintiffs. The claim to limitation of liability under the Warsaw Convention, as modified by the Montreal Agreement, is an affirmative defense on which Pan American has the burden of proof. Pan American points out that a carrier may avail itself of alternative methods of providing the required notice; however, the only method as to which it offers any facts is the notice printed on the Aerolineas Argentinas tickets issued to decedents. There is no genuine issue of material fact regarding the point size of the notice given on the tickets. The notice is in nine-point type, and the Montreal Agreement requires ten-point type. Nine is not ten.

Accordingly, the motion for partial summary judgment is GRANTED.

Date of Entry: May 23, 1984

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3832

D.C. Docket No. CA-82-3476-H

IN RE AIR CRASH DISASTER NEAR NEW ORLEANS, LOUISIANA ON JULY 9, 1982.

LUIS ALBERTO TRIVELLONI-LORENZI and
SUSANNA ELECTRA TRIVELLONI-LORENZI,
Plaintiffs-Appellees,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

JUDGMENT ON HEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the District Court's denial of Pan American's motion to dismiss for forum non conveniens is affirmed; the other issues raised on this appeal are affirmed in part, reversed in part and remitted in part, and the cause is remanded to the District Court for further proceedings and entry of judgment in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 21, 1987

GEE, Circuit Judge, with whom CLARK, Chief Judge, GARWOOD, JOLLY, DAVIS, and JONES, Circuit Judges, join concurring in part and dissenting in part.

GARZA, Circuit Judge, concurring in part and dissenting in part.

JOHNSON, Circuit Judge, concurring.

GARWOOD, Circuit Judge, concurring in part and dissenting in part.

HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3833

D.C. Docket No. MDL 516 (CA-82-3475-H)

ERNESTO SERIO PAMPIN LOPEZ, Individually and As Administrator of the Estate of His Deceased Mother SARA E. LOPEZ DE PAMPIN,

Plaintiff-Appellee,

v.

PAN AMERICAN AIRWAYS, INC., and
UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

JUDGMENT ON HEARING EN BANC

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July 21, 1987

GEE, Circuit Judge, with whom CLARK, Chief Judge, GARWOOD, JOLLY, DAVIS, and JONES, Circuit Judges, join concurring in part and dissenting in part.

GARZA, Circuit Judge, concurring in part and dissenting in part.

JOHNSON, Circuit Judge, concurring.

GARWOOD, Circuit Judge, concurring in part and dissenting in part.

HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate.

APPENDIX H

WARSAW CONVENTION
1929

[Pertinent Excerpts Are Reprinted From The English Translation Of The French Original In The Note Following 49 U.S.C. § 1502 (1982)]

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR*

The President of the German Reich [and other heads of state]:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

* * * *

CHAPTER II—TRANSPORTATION DOCUMENTS

SECTION I—PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in

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* 49 Stat. 3000, T.S. No. 876 (1934).

case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

* * * *

CHAPTER III—LIABILITY OF THE CARRIER

* * * *

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

* * * *

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the

law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

* * * *

APPENDIX I

MONTREAL AGREEMENT

1966

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL [1]

[Reprinted from A. Lowenfeld, *Aviation Law* 971 (2d ed. Doc. Supp. 1981)]

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

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[1] Agreement CAB 18900, approved by order E23630, May 13, 1966 (Docket 17325), note following 49 U.S.C. § 1502 (1982).

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who was wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any por-

tion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other [2] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval of said Board pursuant to said Section 412.

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[2] Either alternative may be used.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

_____

_____

_____

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-750

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS ERNESTO SERIO PAMPIN LOPEZ et al IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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   The Fifth Circuit's decision does not establish a new prerequisite to the invocation of the doctrine of *forum non conveniens* or reduce its utility, nor does the decision conflict with any rule of law articulated by the Sixth Circuit.

2. The resolution of the conflict between the Fifth Circuit and Second Circuits and the District of Columbia Circuit with regard to effect of an air carriers failure to comply with the notice requirements of the Montreal Agreement is irrelevant to the outcome of the case before this Court since there are valid judgments against the United States, whose liability is not limited by the Warsaw Convention.....12

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS
ERNESTO SERIO PAMPIN LOPEZ et al
IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondents, Ernesto Serio Pampin Lopez et al, respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied, and the cause should not be reviewed by this Court. In support of this submission, respondent files this Brief in Opposition pursuant to this Court's Rule 22.

STATEMENT OF THE CASE

Respondents are the relatives of foreign passengers killed when Pan Am Flight 759 crashed shortly after take-off from New Orleans International Airport in Kenner,

Louisiana on July 9, 1982. All are citizens of Uruguay.

They along with other Uruguayan citizens, filed suit in the United States District Court for the Eastern District of Louisiana, naming as defendant Pan Am. They also filed claims against the United States government under the Federal Tort Claims Act, 28 U.S.C. secs. 2671-72, 2675. Once those claims were denied, the original complaint was amended to add the United States as a defendant.

As Pan Am points out in its petition, it moved to dismiss these foreign plaintiffs' cliams based on the discretionary doctrine of *forum non conveniens.* (Pet. p. 3). Since the accidents happened in Kenner, Louisiana, and since it was clear that the United States would be a party, the trial court denied Pan Am's motion, and ruled that the cases would be tried in the forum in which they had been brought.

The United States did not seek relief in this regard. It did not move for *forum non conveniens* dismissal. It did not join Pan Am when it reurged its motion at various stages of the litigation or advise the district court that it intended to seek relief by way of a stay of the proceedings if the claim against Pan Am were dismissed.

Discovery was conducted in Uruguay, where the plaintiffs and their spouses were deposed, and where many documents were produced in response to defendants' requests.

Prior to the trial the district court ruled that Pan Am could not invoke the limitation of liability provision of the Warsaw Convention as modified by the Montreal Agreement since it had not complied with the requirements for notice of the limitation spelled out in the Montreal Agreement. Specifically, the tickets issued to respondents' relatives were not printed in 10-point type as required by the Montreal Agreement.

The United States, petitioner and respondents entered into a stipulation in which both Pan Am and the government agreed not to contest their liability for compensatory damages. (Pet. App. 48a).

Pan Am and the United States appeared and defended the cliams on the issue of damages only. The two cases were tried to verdict in a total of three days. As in other cases arising from this disaster, regardless of the plaintiff's citizenship, Pan Am limited its defense to cross-examination of plaintiffs and their witnesses.[1] The jury rendered a verdict against Pan Am and the government; judgment consistent with that verdict was entered on August 30, 1984. (Pet. App. 97a-99a).

Both defendants appealed the judgment citing eight assignments of error in addition to the two set out above.[2]

A panel of the Fifth Circuit Court of Appeals affirmed the district court's denial of Pan Am's motion to dismiss on the ground of *forum non conveniens,* finding that the court had not abused its discretion in refusing to grant the motion. The panel also affirmed the trial court's ruling that Pan Am was not entitled to a limitation of its liability since it had not complied with the requirements of the Montreal Agreement.[3]

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[1] In cases involving future economic loss Pan Am did call experts to testify in its behalf.

[2] Since the United States and Pan Am were represented by the same attorneys at trial and on appeal, it is not clear from the appellate brief what assignments of error the government joined. However, while the other errors were applicable to the government, it had neighter sought nor was entitled to relief in the trial court on the limitation or *forum non conveniens* issues.

[3] The panel affirmed the judgment in part, vacated in part, and granted remittitur or new trial as to certain of the damage awards to plaintiffs. See Pet. App. p. 81a-96a.

Pan Am requested rehearing *en banc* to review the panel's decision on the *forum non conveniens* issue.[4] The Court granted the petition, vacating the panel's opinion and judgment. Fifth Cir. Loc. R. 35. The *en banc* opinion addressed the *forum non conveniens* issue raised by Pan Am at length and found that the district court had not abused its discretion by refusing to dismiss the plaintiffs' claims. The Court then reinstated the panel's holdings without comment, finding no other isues in the case worthy of *en banc* discussion. (Pet. App. p. 42a-43a)

a. *Forum Non Conveniens. The Court of Appeals, sitting en banc,* determined that the United States, one of two named defendants, had not consented to the jurisdiction of Uruguay. Therefore, the only forum available to the plaintiffs that would allow them to pursue their claims against all defendants was the United States.[5]

The Fifth Circuit found that the trial court had correctly concluded that there was no alternative forum available, and had not abused it discretion by not proceeding to the balancing of the private and public interest factors.

The United States was not amenable to suit in Uruguay, and neither joined nor supported Pan Am's *forum non conveniens* motion. The cases proceeded to trial with the government and Pan Am as defendants, and

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[4] The government did not join the Suggestion for Rehearing *En Banc*.

[5] No defendant approached plaintiffs in Uruguay offering to stipulate to liability and agreeing to waive any objections to that country's jurisdiction. It was not until the anniversary date of the crash had passed that Pan Am informed plaintiffs' counsel of its proposed stipulation. Had plaintiffs not come to the United States to pursue their claims, but waited for the stipulation to determine if defendants were amenable to suit in thier home country, the cases would have been time barred by Louisiana's one year statute of limitations.

judgment was entered against Pan Am and the United States. The government could not and did not appeal the trial court's denial of Pan Am's motion. The judgments against the government are final. Pan Am and the United States have agreed to apportion any judgments between them. Therefore, the issues raised by petitioner is moot.

Pan Am seeks to entice this Court to grant the writ and formulate a rule of law favorable to its position in future cases involving the doctrine of *forum non conveniens*. Even were its reasons for granting the writ valid, this is not the proper case in which to consider the issue.

Contrary to petitioner's argument, the *en banc* decision of the Fifth Circuit neither establishes a "new" prerequisite to the invocation of the doctrine of *forum non conveniens* nor reduces its utility. Nor does the Fifth Circuit's holding conflict with any rule of law articulated by the Sixth Circuit.

b. *The Limitation of Liability.*

The panel affirmed the District Court's finding that Pan Am was not entitled to limit its liability to a maximum of $75,000.00 for the death of these international passengers, finding that the notice of limitation printed on the tickets did not comply with the notice requirement spelled out in the Montreal Agreement. The panel rejected Pan Am's argument that its failure to comply with the letter of the notice requirement of the Agreement did not preclude its availing itself of the treaty limitation. In doing so, the Court adopted the reasoning of the Second Circuit.

Although the District of Columbia Circuit reached a different result, adopting a district court opinion that rejected the Second Circuit's reasoning, the issue does not merit consideration by this Court. Even were Pan Am

entitled to avail itself of the limitation, despite its failure to comply with the requirements of the Montreal Agreement, the treaty limitation does not affect the government's liability. Full damages may be recovered from the United States.

Pan Am and the government have entered an agreement apportioning the damages between them so that even were this court to grant *certiorari* and determine that the limitation is applicable it would have no effect in this case.[6]

REASONS WHY THE WRIT SHOULD BE DENIED

1. Even were this Court to grant the writ and reverse the Fifth Circuit it would have no effect in this case since plaintiffs are entitled to enforce their valid judgments against the United States.

   The Fifth Circuit's decision does not establish a new prerequisite to the invodation of the doctrine of *forum non conveniens* or reduce its utility, nor does the decision conflict with any rule of law articulated by the Sixth Circuit.

The United States was a party to this litigation. It stipulated liability. It did not join or support any of Pan Am's several motions requesting that the district court

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[6] Pre-judgment interest as to Pan Am, but not the United States, is available under Louisiana law. A favorable decision by the Court on this issue could result in a slight reduction of the total award. It is respectfully suggested, however, that this fact does not justify consideration by this Court.

decline to exercise its jurisdiction.[7] It defended the cliams herein on the issue of damages only, and was cast in judgment. It did not raise the *forum non conveniens* issue on appeal or join Pan Am's Suggestion for *En Banc* Reconsideration. The judgment against it is final. Even were this Court to agree with petitioner that this issue merits its consideration, and reverse the Fifth Circuit, plaintiffs will be entitled to execute on the judgment against the United States. Therefore, the issue is moot, and, for this reason alone, the writ should be denied.

However, petitioner's arguments in favor of granting the writ are without merit. Petitioner's first assertion is that the Fifth Circuit decision has added significantly to the threshold requirements to the invocation of the doctrine of *forum non conveniens.* A review of the cases does not support this assertion.

As early as *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947) this Court recognized that the doctrine of *forum non conveniens* presupposes at least two forums in which the defendant is amenable to process. *Id.* at 507. This principle was reaffirmed in *Piper Aircraft v. Reyno,* 454 U.S. 233, 254, n. 22 (1981).

Although this Court has never considered whether the threshold requirement is met where all defendants are

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[7] Petitioner suggests that a defendant who is not amenable to process in the foreign jurisdiction, such as the United States, could seek a stay of the proceeding if the cliams against its co-defendant are dismissed for *forum non conveniens.* Pet. p.14, n. 9. The fact remains that the governme..t did not join or support Pan Am's motion, nor did it seek a stay or advise the trial court of its intention to do so if Pan Am's motion were granted. Speculation as to what the goevernmet might have done does not entitle it to relief. Had Pan Am's motion been granted, plaintiffs, having a stipulation of liability by the United States and jurisdiction of this solvent defendant in its chosen forum, may have elected to dismiss its claim against Pan Am and proceed against the United States only.

amenable to suit in plaintiff's chosen forum but one or more is not subject to the jurisdiction of the foreign forum, other courts have assumed that this requirement presupposed at least two forums in which all defendants were amenable to process. *See, Syndicate 420 at Lloys's London v. Early American Insurance Co.*, 796 F.2d 821, 818 (5th Cir. 1986); *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 357 (6th Cir. 1985); *Calavco Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980).

The interpretation of *Gulf Oil* and *Piper* as requiring an alternative forum in which all defendants are amenable to process prior to balancing of public and private interests is a reasonable one. Convenience and economy to the parties and the courts provide the justification for a court of proper jurisdiction and venue to refuse to exercise that jurisdiction. It is difficult to understand how the interests of convenience and economy are served when one defendant is dismissed to be sued in a foreign forum, but another, not amenable to process in that forum, remains.[8]

The Fifth Circuit's holding that the trial court did not abuse its discretion by refusing to perform a balancing of the various interests where only plaintiff's chosen forum provided a jurisdiction in which all claims against all defendants could be brought is in perfect harmony with the

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[8] Petitioner acknowledges this problem in its discussion of the Sixth Circuit's decision in *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985) Pet. p. 13-14. Although petitioner argues that the defendants not subject to the jurisdiction of the foreign court had a number of options on remand, (Pet. p. 14, n. 19) the appellate court made it clear that these defendants would consent to the jurisdiction of the foreign court or proceed to trial on the merits in the district court. *Id.* at 357.

jurisprudence interpreting *Gulf Oil* and *Piper.*[9]

Petitioner's predictions of dire consequences if the Fifth Circuit's decision is allowed to stand are meritless. *Forum non conveniens* is a discretionary doctrine exercised in the interests of justice. Courts remain free to fashion relief that will aid in the management of complex cases by declining to exercise their jurisdiction when that relief does not constitute an abuse of their discretion.

However, havoc would result were this Court to adopt Pan Am's reasoning and determinne that a court may dismiss an action whenever forum, stipulates to liability, and agree to pay all damage awards. Petitioner's position is calculated to make a defendant who is not amenable to suit in the foreign (and presumably to mover) forum a "superfluous" defendant. See Pet. p. 4, Pet. App. 5a & 41a.

This is exactly the approach rejected by the Sixth Circuit in *Watson*, 769 F.2d 354 at 357. *Watson* involved a products liability action against an Ohio drug manufacturer by foreign plaintiffs. Another case involving similar calims and stemming from the same multidistrict litigation had been dismissed on the basis of *forum non convveniens. Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984). In *Watson* individual employees of the manufacturing were added as defendants. Although the manufacturer consented to the jurisdiction of the foreign forum, it was

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[9] Petitioner's cite a number of cases for the proposition that amenability of third-party defendants to suit abroad is not a *per se* threshold requirement but only a circumstance to be weighed. Pet. p. 9, n. 10. However, in each of the cases cited the third-party defendant was not amenable to suit in the plaintiff's chosen forum but was subject to foreign forum's jurisdiction. The inability to implead a third party in the United States is a factor weighing against retention of jurisdiction. *Piper*, 454 U.S. at 259. none of the cited cases considered the invocation of the doctrine in a case where defendant was able implead other parties in plaintiff's chosen forum only.

not clear that the individual defendants were subject to that forum's jurisdiction. Despite this uncertainty, the trial court dismissed the claims as to all defendants finding that the manufacturer was the "primary" defendant and that plaintiffs would not be prejudiced even were they unable to pursue the individual defendants in the foreign court.

Plaintiffs appealed the dismissal of all claims arguing that the dismissal of their claims when some defendants were not amendable to suit in the foreign forum was an abuse of discretion. The Court found the district court's determination that the individual employees who were not amenable to suit in the foreign forum were not the "primary" defendant, in essence, abolished the threshold showing that defendant was amenable to trial in another forum prior to the galancing of interests, and reversed the court's dismissal of those claims. The case was remanded to allow the remaining defendant's to consent to the foreign court's jurisdiction or proceed to trial in the United States. As the court explained, ". . .the decision of the court below represents an impermissible intermingling of the threshold criteria with the subsequent balancing test." *Id.* at 357.[10]

Finally, petitioner asserts that consideration by this Court is necessary to reconcile a conflict between the Fifth Circuit's decision and that of the Sixth Circuit in *Watson.* A careful reading of the two decisions shows that the cases can be reconciled without this Court's intervention.

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[1] If a defendant is added solely to defeat a *forum non conveniens* dismissal, and the claim against him is without merit then he may seek relief by way of summary judgment or directed verdict not *forum non conveniens* dismissal. *See, Id.*

In *Watson* the Sixth Circuit determined that the district court had not abused its discretion in dismissing the plaintiffs' claim against the Ohio manufactuer who consented to the jurisdiction of the foreign forum. It did so perfunctorily, finding that the district court had adopted the identical procedures established by it in *Dowling*, an earlier related case involving the same issues. *Id.* at 356.

The focus of the Sixth Circuit's concern and the bulk of its opinion centered on the lower court's dismissal of the claims against two co-defendants who had not consented to the foreign forum's jurisdiction. The Court did not squarely address the issue dealt with by the Fifth Circuit herein. In fact, the panel cited with approval authority for the proposition that "*forum non conveniens* dismissal requires availability of an alternative forum possessing jurisdiction as to all parties." (Emphasis added by the Court). 769 F.2d at 357 citing 15 Federal Practices & Procedure, Wright, Miller & Cooper, sec. 3928 at 179 and *Calavco Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2nd Cir. 1980).[11]

Watson did not involve a defendant such as the United States as to whom jurisdiction lies exclusively with the district courts of this country. The Court unlike the district court and the Fifth Circuit, did not have to address the *forum non conveniens* decision, where it was certain that dismissal would not have resolved the matter.[12] Had

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[11] The Fifth Circuit had no problem reconciling *Watson* and cited it, with other authority, in its *en banc* opinion for the proposition that the *forum non conveniens* doctrine presupposes an altermative forum where all defendants are amenable to process. 821 F.2d at 1164.

[12] Although the Sixth Circuit acknowledges that the remaining defendants might not consent to the jurisdiction of the foreign court, it seems clear from excerpts of the trial court's opinion that the defendants were arguing that the foreign forum could exercise jurisdiction over them. 679 F.2d at 357. For this reason, the Court may have assumed that they would be willing to consent to jurisdiction in order to have the claims against them dismissed.

the trial court herein granted the dismissal of the claim against Pan Am as requested the claims against the government would have remained.

2. The resolution of the conflict between the Fifth and Second Circuits and the District of Columbia Circuit with regard to the effort of an air carriers failure to comply with the notice requirements of the Montreal Agreeement is irrelevant to the outcome of the case before this Court where there are valid judgments against the the united States, whose liability is not limited by the Warsaw Convention.

The Warsaw Convention addresses the relationship between an air carrier and its international passangers. One provision of the treaty limits an air carrier's liability for death or injury to $8,300.00. It was modified by the Montreal Agreement, and, among other changes, the limitation of the carrier's liability for injury or death was raised to a maximum of $75,000.00.

Because the limitation of liability notice on the tickets issued in these cases was not in 10-point type the trial court found that Pan Am had failed to comply with the notice requirement provision of the Montreal Agreement, and was not entitled to limit its liability to $75,000. The Fifth Circuit affirmed this decision, adopting the rationale of the Second Circuit in a case dealing with the same issue, *In re: Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (LOT).

Petitioner points to a conflict between the decisions of the Fifth and Second Circuits and that of the District of Columbia Circuit, *In re: Korean Air Lines Disaster of*

September 1, 1983, 829 F.2d 1171 (D.C. Cir. 1987) (KAL), adopting the decision of the district court in KAL, 664 F.Supp. 1463 (D.D.C. 1985).

Pan Am contends that the Fifth and Second Circuit decisions imposing a sanction for an air carrier's failure to comply with the specific notice requirement of the Montreal Agreement fail to address the meaning of certain language in the Warsaw Convention. Pet. p. 17. For this reason, it contends that the District of Columbia Circuit correctly rejected the LOT rationale and concluded that the carrier's limitation of liability is not extinguished by failure to comply with Montreal Agreement requirements.[13] Pet. p. 17, 18.

The District of Columbia adopted the opinion of the district court that ignores a line of federal jurisprudence addressing the issue of notice following the United States' ratification of the Warsaw Convention. *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 85 (2d Cir.) *cert. denied*, 382 U.S. 816 (1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Lisi v. Alitalia-Linie Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966) *aff'd.* 390 U.S. 455, *reh'g. denied* 391 U.S. 929 (1968).

American courts were quite concerned that adequate notice of the limitation of the carrier's liability be provided to the international traveler. It was against this background that the Montreal Agreement, an eleventh hour effort to circumvent this country's withdrawal from the Warsaw Convention, was formulated. *See, LOT*, 705 F.2d at 88; owenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 594-596

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[13] Following the KAL rationale would allow an air carrier to ignore the specific notice requirements of the Montreal Agreement with impunity. *See*, 644 F.Supp. 1463 at 1466, 1475-1476.

(1967). The Agreement addressed the concerns of the treaty's critics, including the courts' concerns regarding "adequate" notice. It sets out certain requirements for the notice, including a provision that the it be printed in "type at least as large as 10-point modern type." Pet. App. 112a. Pan Am did not comply with the notice requirements specified by the Agreement, and the Fifth Circuit correctly affirmed the district court's denial of the liability limitation.

Neither the Warsaw Convention not the Montreal Agreement affects the liability of the united States in this case, and full damages may be recovered from the government. Granting of the writ and reversal of the Fifth Circuit's affirmance of the denial of the limitation to Pan Am would have no effect in this case.[14] A conflict between two Circuits does not require that *certiorari* be granted where, as here, the resolution of the conflict is irrelevant to the ultimate outcome of the case before the Court.

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[14]This is not a case presenting the mere possiblity of future mootness as suggested by Petitioner. See Pet. p. 19, n. 26.

CONCLUSION

A writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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No. 87-750

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

ERNESTO SERIO PAMPIN LOPEZ, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SARA E. LOPEZ, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an alternative forum exists for purposes of undertaking a *forum non conveniens* inquiry only where all defendants are subject to the jurisdiction of that forum.

2. Whether the limitation prescribed by the Warsaw Convention of an air carrier's liability applies only where notice of that limitation is printed on an airline passenger's ticket in at least ten-point type, as required by the Montreal Agreement.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-80a) is reported at 821 F.2d 1147. The panel opinion of the court of appeals (Pet. App. 81a-96a) is reported at 789 F.2d 1092.

JURISDICTION

The judgments of the court of appeals on rehearing en banc were entered on July 21, 1987 (Pet. App. 103a-106a). On October 12, 1987, Justice White extended the time for filing the petition for a writ of certiorari to and including November 6, 1987. The petition for a writ of certiorari was filed on November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 9, 1982, Pan American World Airways Flight 759 crashed near New Orleans, Louisiana, killing all 154 people on board. Petitioner Pan American World Airways, Inc. (Pan Am) was the operator of that flight and the individual respondents, citizens and residents of Uruguay, are heirs of passengers killed in the crash.[1] On August 12, 1982, respondents filed suit in the federal district court of New Orleans against, inter alia, Pan Am, the New Orleans Aviation Board (the operator of the airport) and the Boeing Company (the aircraft manufacturer).[2] The United States was not then named as a defendant. However, the parties anticipated that the United States would be joined as a defendant for claims against the air traffic controllers arising from the crash. In April 1983, respondents commenced administrative proceedings under the Federal Tort Claims Act (FTCA), 28

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[1] Respondent Ernesto Serio Pampin Lopez brought suit for wrongful death and as the survivor of his mother, Sara Lopez de Pampin, his sister, Amparo Pampin Lopez, and his aunt, Irma Lopez de Alvarez. Respondents Luis Alberto and Susanna Electra Trivelloni-Lorenzi brought suit for wrongful death and as survivors of their parents, Luis Alberto and Electra Iris Trivelloni. All of the decedents were citizens and residents of Uruguay who were on vacation in the United States. Pet. App. 3a.

[2] The complaint based jurisdiction upon diversity of citizenship (28 U.S.C. 1332). Of the numerous actions arising from this crash, approximately 52 were filed on behalf of the 42 passengers of Flight 759 who were foreign nationals. All of the actions were transferred by the Judicial Panel on Multi-District Litigation to the Eastern District of Louisiana for pre-trial proceedings. After completion of those proceedings in late 1984, the cases were remitted back to the courts in which they were originally filed for further proceedings. Pet. App. 3a & n.1.

U.S.C. 2671 *et seq.*, against the United States on those claims.[3]

On August 22, 1983, Pan Am moved to dismiss the individual respondents' suit on the ground of *forum non conveniens*. Pan Am advised the court that it would be willing to: (1) submit to the jurisdiction of the courts of Uruguay; (2) concede liability; (3) waive any statute of limitations defense; (4) waive the Warsaw Convention's limitation of damages provision; and (5) guarantee satisfaction of any judgment entered against it in Uruguay. Pet. App. 5a. Based upon those proposed conditions, Pan Am argued that the anticipated joinder of the United States as a defendant was unnecessary (because Pan Am would guarantee payment of any judgment in Uruguay) and that the remaining damage issues could be best tried in Uruguay. In a minute entry docketed September 6, 1983, the district court denied the motion.[4] *Ibid.* After unsuccessfully seeking reconsideration or, alternatively, a certification for interlocutory appeal under 28 U.S.C. 1292(b) from the district court, Pan Am petitioned the court of appeals for a writ of mandamus. On January 18, 1984, the court of appeals denied the request. Pet. App. 5a.

While Pan Am was unsuccessfully seeking interlocutory review on the *forum non conveniens* issue, the individual

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[3] Apparently, at the time respondents initiated their administrative claims, Pan Am had indicated in a sealed minute entry to the district court that Pan Am and the United States were prepared to stipulate to liability (Pet. App. 4a).

[4] At a hearing prior to the filing of Pan Am's motion, the district judge instructed counsel to file the motion, but indicated that it would be denied (Pet. App. 4a-5a, 83a). Anticipating the eventual joinder of the United States, the district judge stated (*ibid.*): "I'm going to rule that you have no right to that transfer * * * [since t]he crash was here and the United States is a party."

respondents, Pan Am, and the United States entered into a stipulation as to liability, damages, defenses and payment under any subsequent judgment (Pet. App. 48a-50a).[5] After the individual respondents' administrative claims under the FTCA were denied, the United States was added as a defendant to this action on February 17, 1984. Prior to trial, the district court also ruled that Pan Am could not avail itself of the $75,000 damages limitation of the Warsaw Convention[6] (as modified by the Montreal Agreement of 1966) because the notice of the liability limitation on the passengers' tickets was in nine-point type, rather than ten-point type, as required by the Montreal Agreement.[7] Following trial, the jury returned a verdict for respondent Lopez of $516,853.89 and for respondents Trivelloni-Lorenzi of $203,530. Pet. App. 7a.

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[5] Under the terms of those agreements, defendants Boeing Company and New Orleans Aviation Board were dismissed with prejudice (Pet. App. 48a).

[6] This treaty, commonly referred to as "the Warsaw Convention," is formally titled the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. 1502 note. The United States has been a party to the Warsaw Convention since 1934. Under Article 22(1) of the Convention (49 Stat. 3019), carrier liability was originally limited to 125,000 francs (now approximately $10,000). Pertinent portions of the Warsaw Convention, 49 U.S.C. App. 1502 note, are reproduced at Pet. App. 107a-110a.

[7] The Montreal Agreement is a private agreement among air carriers that raised the limitation of liability to $75,000 from the $10,000 originally established under Article 22(1) of the Warsaw Convention (49 Stat. 3019) (see note 6, *supra*). By signing the Montreal Agreement, air carriers also stipulated that they would "at time of delivery of the tickets, furnish to each passenger governed by the Convention * * *, a notice in ten point type advising international passengers of the limitations of liability." Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague

2. A panel of the court of appeals affirmed (Pet. App. 81a-96a). The panel concluded (*id.* at 89a-90a) that the "trial court correctly denied the motion to dismiss on the grounds of *forum non conveniens*." According to the panel (*id.* at 90a), "[t]hese cases should have been tried in the very forum in which they were tried, the place where this tragic accident occurred." The panel also affirmed (*id.* at 90a-91a) the district court's ruling that the Warsaw Convention's liability limitation did not apply because the notice of that limitation on the passenger's ticket was printed only in nine-point type.

3. The court of appeals granted rehearing en banc on the *forum non conveniens* issue and unanimously affirmed (Pet. App. 1a-47a). The majority opinion, joined by fourteen judges, concluded (*id.* at 41a) that the district court had not abused its discretion in denying the motion on the ground that "Pan American had failed to carry its burden of demonstrating that an alternative foreign forum was available to plaintiffs." The court held (*ibid.*) that "it was proper for the court to consider the ultimate presence of the United States as a party in evaluating whether an alternative forum was available to plaintiffs." According to the court, moreover, no alternative forum was available in Uruguay because the United States was not subject to the jurisdiction of any foreign forum. The court rejected Pan Am's contention that its assurances "to pay any judgment rendered in an alternative forum and its consent to submit to the alternative forum's jurisdiction and its underwriter's commitment to guarantee the payment of any judgment made an alternative forum available" (*ibid.*). The court

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Protocol, summarizing C.A.B. Agreement No. 18,900 (May 13, 1966), *reprinted in* 49 U.S.C. app. 1502 note at 1229. See also Order E-23,680, Dkt. No. 17,325 (CAB May 13, 1966), *reprinted in* 31 Fed. Reg. 7302 (1966); 14 C.F.R. 203.1 *et seq.* Pertinent portions of the Montreal Agreement are reproduced at Pet. App. 111a-114a.

stressed (*id.* at 42a (emphasis in original)) that "Pan American and its underwriters guaranteed to pay 'any judgment rendered against *it*,' [but] [t]he 'it' referred to is Pan American and not another defendant such as the United States."[8]

Judge Higginbotham concurred in the judgment (Pet. App. 68a-80a). Judge Higginbotham disputed the majority's threshold ruling that a federal, rather than state, *forum non conveniens* rule should apply in diversity actions. He nonetheless concurred in the judgment because Louisiana has no doctrine of *forum non conveniens*.

ARGUMENT

We share petitioner's general concern that the *forum non conveniens* analysis applied by the court of appeals is unduly rigid. We do not, however, believe that further review is warranted on that ground in this case because affirmance of the district court's denial of Pan Am's motion would be proper even under a more flexible analysis, particularly now that the trial on the merits is complete.

Review of the second question presented by the petition, however, is appropriate either in this case or in another case currently pending before this Court that raises the same issue. Further review would appear warranted to resolve a square conflict that now exists between the court of appeals' decision in this case, which adopts the view of the Second Circuit in *Robles* v. *Lot Polish Airlines* (*In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980*),

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[8] The court also noted (Pet. App. 39a-40a) that where, as in this case, the trial on the merits had already occurred, a court of appeals should normally affirm the denial of a motion to dismiss on grounds of *forum non conveniens* "[u]nless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff."

705 F.2d 85, cert. denied, 464 U.S. 845 (1983), and the D.C. Circuit's subsequent decision in *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (1987), petition for cert. pending, No. 87-1055, which adopts the view of the Canada Supreme Court in *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (1979). Although the importance of the issue is less clear—air carriers should be able to prevent the lifting of the Warsaw limitations merely by ensuring that the notice of those limitations is printed on tickets in the required ten-point type—we are ultimately persuaded that the need for uniform construction of the international convention renders further review appropriate.[9] We suggest, moreover, that review might be more appropriate in *Elisa Chan* v. *Korean Air Lines, Ltd.*, petition for cert. pending, No. 87-1055, which raises the identical issue, because in that case, unlike this one, the Court's determination would have a practical impact on the amount of damages ultimately paid by the parties.

1. The court of appeals concluded (Pet. App. 42a) that Pan Am's motion to dismiss for *forum non conveniens* was properly denied because Pan Am had "fail[ed] to make all defendants available to plaintiffs in a Uruguayan forum." We agree with the basic premise that a district court should not dismiss a lawsuit against a particular defendant for *forum non conveniens*, when that defendant cannot be sued in the alternative forum. As this Court has made clear, the "doctrine * * * presupposes at least two

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[9] We initially waived response to the petition in this case because the United States did not actively participate in the litigation in the lower courts. The government did not address either of the two issues presented by the petition in the courts below and it did not participate at all in the en banc proceeding.

forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506-507 (1947); see also *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 254 n.22 (1981).

It does not inexorably follow from that premise, however, that a motion to dismiss for *forum non conveniens* can never be granted as to any defendants in a case involving multiple defendants unless all defendants are subject to the alternative forum's jurisdiction. A district court may sever the action and grant the motion only with respect to those defendants amenable to process in the alternative forum. In an appropriate case, moreover, the court may also stay the proceedings against the remaining defendants in its own forum pending completion of the proceedings in the more convenient forum in order to avoid parallel, and duplicative, proceedings. In some instances, resolution of the controversy in the alternative forum may effectively end any need for further litigation in the initial forum.

Of course, because "the central focus of the *forum non conveniens* inquiry is convenience" (*Reyno,* 454 U.S. at 249), the need to sever would weigh heavily against the grant of a defendant's motion—indeed, as a practical matter, it would be dispositive of the motion in most cases. But, contrary to the court of appeals' ruling, the need to balance the private and public interest factors is not wholly precluded as a matter of law in those circumstances any more than it is where additional third-party defendants may need to be interpleaded (see *Gilbert,* 330 U.S. at 511), or "where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff" (*Reyno,* 454 U.S. at 238, 247). See generally *Gilbert,* 330 U.S. at 508-509; *Koster* v. *American Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 527

(1947). The doctrine of *forum non conveniens* therefore provides the district courts with flexibility at least to consider the possibility that dismissal should be ordered with respect to some of the defendants and not others (cf. *Watson* v. *Merrell Dow Pharmaceuticals*, 769 F.2d 354 (6th Cir. 1985)),[10] and it allows the courts of appeals to conclude that a district court has abused its discretion by failing to do so.

This case underscores the importance of considering the circumstances of each case. In conjunction with its motion to dismiss, petitioner, supported by its insurers (Pet. 3 n.5), offered to: (1) submit to the jurisdiction of the Uruguayan courts; (2) concede liability; (3) waive any statute of limitations defense; (4) waive the Warsaw Convention limitation of damages; and (5) guarantee satisfaction of any judgment entered against it in Uruguay. Pet. App. 5a. In our view, this proposed stipulation renders much less important the amenability of the United States to suit abroad—the linchpin of the court of appeals' denial of Pan Am's motion. The court of appeals, however, failed to consider the full practical implications of Pan

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[10] *Watson* v. *Merrell Dow Pharmaceuticals*, 769 F.2d at 355-356, involved product liability claims against an American pharmaceutical corporation (and two of its employees) for birth defects suffered by residents of England and Scotland arising out of the use of defendants' drug, Debendox, in those countries. Although defendant Merrell was prepared to stipulate to adjudication of its liability in the United Kingdom, it was not clear whether jurisdiction could be exercised over the individual defendants in that alternative forum (see *id.* at 356-357). The court of appeals affirmed the district court's conditional dismissal of the case against Merrell on *forum non conveniens* grounds, reversed the district court's order dismissing the action against the individual defendants, and remanded for a trial against those defendants in the domestic forum unless they would consent to jurisdiction in the foreign forum (*ibid.*).

Am's agreement to pay all of the judgment.[11] The court considered (*ibid.*) only whether "Pan American's conditional promises * * * ma[d]e all defendants available to plaintiffs in a Uruguayan forum."[12]

We nonetheless do not believe that further review is warranted of the court of appeals' *forum non conveniens* holding. This case is not an appropriate vehicle for considering the validity of the lower court's analysis because the result in this case does not depend on it. The district court's denial of Pan Am's motion would not warrant reversal even applying the flexible analysis reflected in this Court's decisions. Those decisions stress that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gilbert*, 330 U.S. at 508), and that the trial court's determination "deserves substantial deference" and "may be reversed only when there has been a clear abuse of discretion" (*Reyno*, 454 U.S. at 257, citing *Gilbert*, 330 U.S. at 511-512 and *Koster*, 300 U.S. at 531). No such "clear

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[11] The court of appeals made much of the limited language of Pan Am's guarantee "to pay 'any judgment rendered against *it*' (emphasis added)" (Pet. App. 42a). In view of Pan Am's concession of liability—presumably for the injuries resulting from the crash—it is difficult to imagine how the absence of the United States from the Uruguayan action would in any way reduce the recovery afforded to plaintiffs.

[12] Of broader concern, the court of appeals' per se approach might prompt plaintiffs to name as a defendant a party who is not amenable to process in a foreign forum, for the sole purpose of anchoring in the United States a lawsuit that both a balance of the convenience and the interests of justice would suggest should be tried in the foreign jurisdiction. As a practical matter, therefore, the court of appeals' approach might increase "[t]he flow of litigation into the United States and further congest already crowded courts" (cf. *Reyno*, 454 U.S. at 252 (footnote omitted)).

abuse of discretion" occurred in this case, where the lawsuit was brought where the accident occurred.[13]

Indeed, the current procedural posture of the case renders reversal of the district court order now especially unjustified. The trial on the merits is now complete.[14]

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[13] The only issue before the district court was the amount of damages to which the individual respondents were entitled because Pan Am was willing to stipulate as to its liability (see Pet. App. 5a). Neither the private or public interests implicated clearly favor the Uruguayan forum over the domestic forum selected by the individual respondents. With regard to the former, although evidence relevant to respondents' familial relationships would likely be more available in the foreign forum, any evidence of damages related to the circumstances of the accident would be in New Orleans. See Pet. App. 7a, 85a. Hence, "the relative ease of access to sources of proof," the "availability of compulsory process," and the "cost of obtaining attendance of willing[] witnesses" did not require dismissal (*Gilbert*, 330 U.S. at 508). Nor are there genuine concerns about either the "enforceability of [the] judgment" or the selection of a forum to " 'vex,' 'harass,' or 'oppress' " the defendant. The action was brought in New Orleans, where the accident occurred (*ibid.*).

Public interest factors likewise do not meet the high standard required for reversal. The district court, which has before it all of the consolidated pre-trial proceedings (see Pet. App. 3a n.1), was plainly familiar with the case and with relevant state law, although "problems in conflict of laws" were presented (compare *id.* at 43a-46a n.38 with *id.* at 51a-67a; see *Reyno*, 454 U.S. at 251). Moreover, because the accident occurred in New Orleans, the matter was "handled at its origin" and citizens in an unrelated forum were not unfairly burdened by jury duty (*Gilbert*, 330 U.S. at 508-509).

[14] In *Van Cauwenberghe* v. *Biard*, cert. granted, No. 87-336 (Nov. 9, 1987), this Court is currently considering a related question: whether a district court's denial of a motion to dismiss for *forum non conveniens* should be immediately appealable as a collateral order under 28 U.S.C. 1291 and *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). One relevant factor in that determination is whether the order is "effectively unreviewable on appeal from final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); see *String-*

Reversal would mean that the litigation would have to start anew in Uruguay.[15]

2. The second question presented by the petition warrants further review. We suggest, however, that the issue might be more appropriately addressed in *Elias Chan* v. *Korean Air Lines, Ltd.*, petition for cert. pending, No. 87-1055, which raises the identical issue.

The decision of the court of appeals in this case, which embraces the ruling of the Second Circuit in *Robles* v. *Lot Polish Airlines* (*In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980*), 705 F.2d 85, cert. denied, 464 U.S. 845 (1983), squarely conflicts with the recent D.C.

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fellow v. *Concerned Neighbors in Action*, No. 85-184 (Mar. 9, 1987). The Fifth Circuit is among those that have concluded that such a ruling should not be considered a collateral order. See *Partrederiet Treasure Saga* v. *Joy Mfg.*, 804 F.2d 308 (1986). In the instant action, the court of appeals concluded (Pet. App. 39a-40a) that "[u]nless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, we believe the trial's occurrence and completion bolsters the district court's original decision to deny the motion to dismiss."

[15] A further complicating procedural factor also suggests that review of the *forum non conveniens* issue is not warranted. The district court denied Pan Am's motion to dismiss before the individual respondents amended their complaint to name the United States as a defendant (see Pet. App. 5a-6a). For this reason, the United States never formally supported Pan Am's motion, moved for dismissal of the action against the United States on *forum non conveniens* grounds, or sought severance of the action against it and a stay pending the filing of a lawsuit against Pan Am in Uruguay. The government also did not address the *forum non conveniens* issue in the court of appeals at either the panel or en banc proceeding. Consequently, although the judgment against Pan Am could now be reversed on *forum non conveniens* grounds, whether the judgment against the United States could likewise be reversed on that ground is not free from doubt.

Circuit decision in *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (1987), and the Supreme Court of Canada's decision in *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (1979). Both the Second and Fifth Circuits have concluded that the limitations on air carrier liability established by the Warsaw Convention (as modified, in effect, by the Montreal Agreement) do not apply unless the notice of that limitation is printed on the passenger's ticket in at least ten-point type, as required by the Montreal Agreement.[16] They reason that the Warsaw Convention's liability limitations are conditioned on adequate notice and that the Montreal Agreement establishes the standard (ten-point type) that must be met (see 705 F.2d at 89-91).[17]

By contrast, a panel of the District of Columbia Circuit has held that the failure to provide notice of the liability limitation in ten-point type does not preclude an air carrier from availing itself of the limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1173,

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[16] In the Second Circuit case, the notice was printed in 8.5-point type (see 705 F.2d at 86) and in this case it was printed in nine-point type (Pet. App. 91a).

[17] Article 3(1)(e) of the Convention (49 Stat. 3015) provides (Pet. App. 108a) that "[f]or the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: * * * * * (e) A statement that the transportation is subject to the rules relating to liability established by the convention." Article 3(2) (49 Stat. 3015) provides (Pet. App. 108a):

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less [*sic*] be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

1176 (1987), aff'g 664 F. Supp. 1463 (D.D.C. 1985).[18] In so ruling, that court relied, in part, upon a decision of the Supreme Court of Canada, *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (1979), rev'g 53 D.L.R.3d 636 (Que. C.A. 1974), aff'g in part and rev'g in part 12 Av. Cas. (CCH) ¶ 17,191 (Que. Super. Ct. 1971), where the Canadian court found (98 D.L.R. at 57):

> the words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only if no ticket is delivered. The American cases referred to above [including *Lisi*] which hold that delivery of the ticket with an irregularity, that is, a statement as required by art. 1(e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law.

We share the Second and Fifth Circuits' view that the Warsaw Convention's limitation on air carrier liability applies only when adequate notice of that limitation is provided to the passenger. The government's views on this issue were previously outlined in memoranda filed in

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[18] The court of appeals explicitly "adopt[ed] as [its] opinion the comprehensive * * * decision of the district court, reported at 664 F. Supp. 1463" (829 F.2d at 1173). The district court found (664 F. Supp. at 1477-1478) under the Warsaw Convention "that in exchange for virtual strict liability against air carriers, international passengers are limited in their recoveries" and that the Montreal Agreement altered that "*quid pro quo*" only to the extent of raising the amount of recovery to $75,000. Hence, the district court concluded (*id.* at 1476-1478) that the liability limitation amounted to a treaty obligation of the United States entered into by the political branches that the judiciary could not alter. See also *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting).

response to this Court's invitation to express the views of the United States in *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 (1968), aff'g by an equally divided court 370 F.2d 508 (2d Cir. 1966). See 67-70 U.S. Memo. at 5-9 (jurisdictional stage); see also 67-70 U.S. Memo. at 1 (merits brief).[19]

We also believe that the Montreal Agreement provides the standard—ten-point type—by which the adequacy of notice should be measured. As described by the Second Circuit (705 F.2d at 88 (footnote omitted)), "[t]he Montreal Agreement is by its very terms a 'special contract' under Article 22(1) of the Convention, which provides that a carrier and passenger 'may agree to a higher limit of liability.' " Under that agreement, "[i]n return for waiving the Article 20(1) ['all necessary measures'] defense and complying with the notice requirement [of ten-point type], carriers receive the benefit of a liability limitation of $75,000" (705 F.2d at 88). The D.C. Circuit's contrary ruling is based on the erroneous premise that adequate notice is not a precondition of invoking the liability limitation under the Warsaw Convention (see 664 F. Supp. at 1476).

We conclude reluctantly that the present conflict concerning the meaning of the Warsaw Convention and the Montreal Agreement justifies this Court's review. Although one might expect that the problem is easily eliminated by the consistent use of ten-point type, that resolution has proven elusive. Review by this Court would seem to be the only means of reestablishing uniformity among American courts on an issue of significant financial importance that may be expected to recur. We suggest, however, that review of this issue might be more appropriate in *Elisa Chan* v. *Korean Air Lines, Ltd.*,

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[19] We have provided the parties in this case with copies of those two prior memoranda.

petition for cert. pending, No. 87-1055, which raises the identical issue. In that case, unlike this one, the application of the Warsaw Convention's liability limitation would have a practical impact on the amount of damages ultimately paid by the parties.[20] Respondent in No. 87-1055 also supports certiorari in that case (see 87-1055 Resp. Memo. at 5).

CONCLUSION

The petition for a writ of certiorari should be denied with respect to question 1. The petition should be held with respect to question 2 pending this Court's disposition of the petition in No. 87-1055.

Respectfully submitted.

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MARCH 1988

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[20] Prior to trial, Pan Am and the United States entered into a sharing agreement in which each agreed to pay a fixed percentage of any damages awarded to the individual respondents. Hence, because the Convention's liability limitation does not apply to the United States, the amount of damages paid by Pan Am in this case will not be affected by that limitation, except to the extent that the United States, unlike Pan Am, is not liable for prejudgment interest (see Pet. App. 96a).

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No. 87-750

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PAN AMERICAN WORLD AIRWAYS, INC.,
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v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

Pan Am's petition [1] urges this Court to review two rulings of the court below—one holding that the doctrine of *forum non conveniens* may not be invoked unless all defendants are amenable to suit abroad; the other holding that an air carrier may not invoke international limitations on liability if it provides advice of those limits in type smaller than 10 point. At the request of this Court, the respondents-plaintiffs filed their brief in

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[1] The companies and organizations Pan American World Airways, Inc. ("Pan Am") is required to list in compliance with Rule 28.1 of the Rules of this Court are set forth on page (i) of Pan Am's petition.

opposition on January 20, 1988, and the respondent United States, a defendant below, filed its brief on March 11, 1988.[2]

1. *Forum Non Conveniens.* The Government agrees with Petitioner that the threshold rule adopted by the Fifth Circuit—*all* defendants must be available in the foreign forum—is wrong. The Government would, however, defer review until a later case because a better vehicle may come along. (Gov't Br. p. 10.) That view underestimates the importance of promptly correcting the Fifth Circuit's ruling. That ruling was unanimously adopted by fifteen judges[3] sitting *en banc.* The court's well-developed opinion is likely to serve as a primer for *forum non conveniens* decisions. The Fifth Circuit's rule, moreover, operates only to deny—not to grant—motions to dismiss; thus, obtaining review of the rule in other cases will be difficult unless *forum non conveniens* rulings, contrary to prevailing law, are recognized to be collateral orders that are subject to prompt interlocutory review.[4]

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[2] While our petition has been pending, this Court has received a petition and response in *Chan* v. *Korean Air Lines Ltd.*, *("KAL")*, No. 87-1055 (Dec. 23, 1987). The decision below in *KAL* formed part of the conflict that supports review of the second question presented here by Pan Am.

[3] We count Judge Higgenbotham in the majority. Conceivably, he could be treated as having abstained since he dissented from the *en banc* court's ruling that under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal law, not state law, supplies the correct standard for *forum non conveniens* decisions. (App. 68a-80a.) This Court has previously left the *Erie* question open. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 248 n.13 (1981) citing, *inter alia*, *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 509 (1947).

[4] This Court is presently considering whether a district court's denial of a *forum non conveniens* motion can be appealed as a collateral order under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Van Cauwenberghe* v. *Biard*, *cert. granted*, No. 87-336 (Nov. 9, 1987).

The Solicitor General's conclusion that this case is "not an appropriate vehicle" (Gov't Br. p. 10) rests on his notion that the ultimate result would be the same even if the trial court or the court of appeals were to apply the correct analysis on remand from this Court. The fifteen judges, however, did not indicate that the result reached by the *en banc* court would be the same if the factors set out in *Gilbert* and *Reyno* were assiduously applied. Even though (a) the panel had tried to decide the case on the basis of the *Gilbert* and *Reyno* factors and (b) the parties had fully briefed the factors to the *en banc* court, the *en banc* court affirmed solely on the basis of the "all or none" requirement. The Solicitor General's prediction about the ultimate outcome is impeached by the fact that the *en banc* court, in a carefully considered opinion, unanimously rested on a new ground and did not take the path that the Solicitor General now suggests would readily produce the same results.[5]

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[5] The Government asserts that no "'clear abuse of discretion' occurred in this case where the lawsuit was brought where the accident occurred." (Br. pp. 10-11.) That assertion significantly overstates the importance of the crash site. The United States fails to come to grips with the fact that, in a wrongful death case when liability is not contested, the evidentiary inquiry changes from how the accident happened to how much the decedent and his or her relatives lost. The accident site is not particularly significant in resolving the damages issues unless the site also happens to be the domicile or residence of the decedent or his or her family. Moreover, when, as here, priority is given to the accident site, the defendant (but not the plaintiff) has difficulty obtaining access to proof and conducting discovery respecting the only issue in the case—damages.

The fact that the foreign plaintiffs swiftly bring suit at the United States accident site before the carrier announces that it will not contest liability is equally insignificant. Here, the plaintiffs filed their complaints just one month after the crash. Plaintiffs in such cases may reasonably expect that liability issues will not be contested. See, *e.g.*, decisions listed in Pet. at 12-13 nn.17 & 13. Judge Gee's dissent in the instant case points out (Pet. App. 52a

The plaintiffs-respondents state (Br. 5, 7) that even if Pan Am ultimately prevails on *forum non conveniens* grounds, respondents can execute on their judgments against the United States and thereby moot the issues presented. We disagree with respondents' premise.[6] In addition, their conclusion is in error since, even if plaintiffs could execute against the Government, the controversy between Pan Am and plaintiffs would remain. The judgments against Pan Am would require it to pay approximately $127,900 in prejudgment interest.[7] That is

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n.1) that "[i]n aircrash disasters, as a rule, the defendant airline concedes liability. (Pan American notes that the last reported mass aircrash disaster case in which liability was contested was nine years ago. *In re Air Crash at John F. Kennedy International Airport*, 479 F. Supp. 1118, 1120-21 (E.D.N.Y. 1978).)"

[6] The plaintiffs-respondents assume that the United States is now foreclosed from having the judgments against it vacated if Pan Am prevails on the *forum non conveniens* issue. Contrary to plaintiffs' understanding of the record, the United States and Pan Am appealed from the judgments and both argued in their joint briefs that the *forum non conveniens* ruling was erroneous. The Solicitor General states that the government "did not address the *forum non conveniens* issue in the court of appeals at either the panel or the en banc proceeding." (Gov't Br. p. 12 n.15.) We disagree with his interpretation of the joint briefs filed before the panel, in which the argument for reversal was presented on behalf of the "defendants," *i.e.*, Pan Am and the United States, who were the only defendants left in the case by the time their joint notices of appeal were filed. Brief of Appellants Pan Am and the United States in No. 84-3833 at 9, 16, 22, 24, 26, 71-72 and in No. 84-3832 at 9 & 11 (incorporating the arguments made in the brief in No. 84-3833). The United States was not in any event required to present an argument that was "vigorously asserted" by another party and addressed by the court of appeals (*O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980)), to seek rehearing in the court of appeals (see S.Ct. Rule 20.4) or to petition for certiorari in this Court (*O'Bannon*, 447 U.S. at 783 n.14), to preserve its ability to challenge the judgments against it.

[7] Under Louisiana law, prejudgment interest at times relevant here accumulated at the rate of 12% per year from the date of demand until the date of judgment. La. Civ. Code Art. 2924 B(2)(c)

almost one-fourth of the amount of the judgments for plaintiffs. The judgments against the United States do not—and cannot—provide for prejudgment interest. (App. at 96a; see also 28 U.S.C. § 2674.)

2. *Warsaw/Montreal.* The Government agrees in principle that the issue respecting the Warsaw and Montreal limits on liability warrants review by this Court. In suggesting that such review be made in the *KAL* case, No. 87-1055, the Government erroneously states that applying these limitations in Pan Am's case would not have "a practical impact on the amount of damages ultimately paid by the parties." (Gov't Br. p. 16.) In fact, if the Warsaw/Montreal limitations apply here, the amount of prejudgment interest Pan Am would owe would be reduced from approximately $127,900 (see n.7) to approximately $76,000—a savings of about $51,900.[8] For the reasons set out in our petition and the Government's response, this second question should be reviewed.

(1984). Approximately two years lapsed between the filing of the complaints and the date the district court entered judgment.

Our estimate of the prejudgment interest ($127,900) assumes that the remittiturs ordered by the court of appeals are accepted. If the families accept the court of appeals' remittiturs, these judgments would be reduced to $364,353.89 (for the Pampin-Lopez family) and $168,530.00 (for the Trivelloni-Lorenzi family). Two years at 12% each produces the total above.

[8] If the Warsaw/Montreal limit were applied here, the judgments against Pan Am, prior to the addition of interest, would be approximately $165,000 in the *Pampin-Lopez* case and approximately $150,000 in the *Trivelloni-Lorenzi* case. Under the Fifth Circuit rule, prejudgment interest would be assessed on these amounts. *Mahfoud* v. *Eastern Air Lines, Inc.*, 729 F.2d 777 (5th Cir. 1984), *aff'd by an equally divided Court*, 474 U.S. 213 (1985). At 12% per year for two years on these amounts, Pan Am would owe approximately $76,000 in prejudgment interest instead of about $127,900.

CONCLUSION

For the reasons presented in the petition, this Court should review the *forum non conveniens* and the Warsaw/Montreal issues.

Respectfully submitted,

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